Supreme Court, U.S.
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No.

In The
Supreme Court Of The United States

GEORGE A. MAYES,
Petitioner,
v.
LOCAL 106, INTERNATIONAL UNION OF OPERATING ENGINEERS, JANE M. LABARGE,(former) Office Manager, WILLARD J. LABARGE,(former) Business Manager, RICHARD C. KOSITZKA, (former) Treasurer, JAMES F. TOMMANEY, (former) Treasurer, JOHN J. KELLOGG, (former) President and Treasurer, FRANK LOMIO, Local 106 Coordiner, DIANE O'HARE, Office Manager, GORDON M. KILBY, Local 106 Training Fund Trustee, EUGENE HALLOCK, Local 106 Training Fund Trustee, GENE MESSERCOLA, Business Manager, ROBERT VAN DYKE, Plan Administrator, Engineers Joint Benefit Funds,
Defendants.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals for the Second Circuit

PETITIONER'S APPENDIX

GEORGE A. MAYES, *pro se*
11 GOLD STREET
WARRENSBURG, N.Y. 12885
(518) 623-9389

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

GEORGE A. MAYES,

Plaintiff,

v. 93-CV-716 (NPM)(RWS)

LOCAL 106, INTERNATIONAL UNION OF

OPERATING ENGINEERS, JANE M. LABARGE, (former) Office Manager, WILLARD J. LABARGE, (former) Business Manager, RICHARD C. KOSITZKA, (former) Treasurer, JAMES F. TOMMANEY, (former) Treasurer, JOHN J. KELLOGG, (former) President and Treasurer, FRANK LOMIO, Local 106 Coordiner, DIANE O'HARE, Office Manager, GORDON M. KILBY, Local 106 Training Fund Trustee, EUGENE HALLOCK, Local 106 Training Fund Trustee, GENE MESSERCOLA, Business Manager, ROBERT VAN DYKE, Plan Administrator, Engineers Joint Benefit Funds,

Defendants.

APPEARANCES: OF COUNSEL:

PETER HENNER, ESQ.
Office of Peter Henner, Esq.
P.O. Box 326
Clarksville, New York 12041-0326
Counsel for Plaintiff

RICHARD P. WALSH, JR., ESQ.
Lombardi, Reinhard, Walsh & Harrision, P.C.
111 Winners Circle
Albany, New York 12205
Counsel for Defendants

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NEAL P. McCURN, SR. J.

. MEMORANDUM-DECISION and ORDER

Plaintiff's amended complaint is a bit lengthy: three volumes comprising 637 pages and more than 800 paragraphs. It is the second of three federal actions regarding plaintiff's disputes with Local 106 of the International Union of Operating Engineers ("Local 106"), as well as several of its administrators and members. The first action, which the parties refer to as Mayes I, was tried before the court without a jury and resulted in a judgment in favor of the defendants.[2] See Mayes v. Local 106, Intern. Union of Operating Engineers, No. 86-CV-41, 1995 WL 30576 (N.D.N.Y. Jan. 20, 1995). The third action, captioned Mayes v. Messercola, No. 94-CV-26, remains pending. In this matter, plaintiff premises jurisdiction upon a host of federal statutes: the Racketeering Influenced and Corruption Act ("RICO"), 18 U.S.C. Sections 1961-1968; the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sections 1101, 1104, 1132; the Labor

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(Sic).

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Each defendant in Mayes I–Local 106, Willard J. LaBarge, and Diane O'Hare–is named a defendant in plaintiff's instant suit. Of these three, only Local 106 is named in plaintiff's third action, Mayes III.

Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. Sections 412, 529; the Hobbs Act, 18 U.S.C. Section 1951; the Fair Labor Standards Act ("FLSA"), 29 U.S.C. Sections 201-219; Section 301 of the Labor Management Relations Act of 1974 ("LMRA"), 29 U.S.C. Section 185-186; and various criminal law statutes, namely U.S.C. Sections 2, 371, 1027 and 1341, as well as other miscellaneous civil remedies. Of the thirty-three causes of action, plaintiff summarizes that sixteen allege improper payments to Local 106's pension fund, while four allege improprieties relating to a sale of a Local 106 training facility ("the Westerlo facility"). The remaining causes allege other miscellaneous improper actions, including: granting union membership to unqualified individuals; failing to respond to plaintiff's inquiries; improper hiring of retired union members; violations of the Fair Labor Standards Act; and breach of fiduciary responsibility. Currently before the court is defendants' motion for summary judgment, which plaintiff opposes.

BACKGROUND

Local 106 represents operating engineers. Its members operate heavy construction equipment–e.g., bulldozers, cranes, backhoes–and work for contractors pursuant to collective bargaining agreements, which Local 106 negotiates. Plaintiff, an operating engineer until his retirement in 1988, has been a member of Local 106 since 1954. During the summer of 1980, he served as its business agent. In December of that year, defendant Willard J. LaBarge was elected Local 106's business manager, a position

which he held until 1987.[3] Plaintiff contends that following LaBarge's election, LaBarge and his associates–who plaintiff labels the "LaBarge group"–administered Local 106 as a corrupt enterprise. Including LaBarge, eight defendants comprise this group: Jane M. LaBarge (now deceased); Richard Kositzka; Lester E. Jones; John J. Kellogg; James F. Tommaneyl; Frank Lomio; and Diane O'Hare. This group, plaintiff contends, conspired in 1979 to gain control of Local 106. Once in control, its members allegedly used t heir power to reward themselves and their friends, punish their opponents, and perpetuate their authority by: (1) preferentially assigning jobs to friends, relatives and political cronies; (2) authorizing and benefitting from excessive contributions to union pension funds; and (3) administering union assets for their personal gain.

As to the cronyism charge, plaintiff contends Jane LaBarge, the office manager and dispatcher for Local 106, assigned jobs to favored union members as a quid pro quo for their political support; those in good standing with the LaBarge group benefitted handsomely from her actions; those in its disfavor lost economic opportunities that otherwise might have been theirs. The matter of the pension contributions is more complicated, however.

Plaintiff explains that members of Local 106 participate in two pension funds; the Engineers Joint Pension Fund ("Engineers Fund") and the Central Pension Fund ("Central Fund"). Contractors who hire Local 106 members contribute to these funds based upon rates determined by collective bargaining agreements.

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Unless otherwise noted, any references to LaBarge, *supra*, are to Willard LaBarge and not Jane LaBarge.

Local 106 likewise contributes to these funds, but its payments are made on behalf of its paid officers and office staff. Local 106 does not contribute directly, however. It channels payments through the Engineers Joint Benefit Funds ("Joint Fund"), which both administers the Engineers Fund and acts as a conduit to the Central Fund.[4] Along with its contributions, Local 106 submits reports to the Joint Fund. Plaintiff, who has reviewed these reports, charges Local 106 with making excessive contributions to Joint Fund from 1981 to 1993. By his estimate, the total overpayment amounts to more than $225,000.

Defendants' excessive contribution scheme allegedly had two angles. First, in making their contributions to the Joint Fund, which, if the court understands correctly, ultimately were intended for the Engineers Fund, defendants customarily overreported the hours Local 106's staff members and officers worked by approximately six to eight hours per week. Second, when defendants sent the Joint Fund contributions intended to be passed through to the Central Fund, in addition to overreporting their weekly hours, they based these payments on an improper, higher hourly contribution rate. Although he seeks damages for defendants' alleged violations of various labor laws, at the heart of plaintiff's suit is his desire to recover these alleged pension fund

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[4] Although the matter is not entirely clear to the court, apparently when Local 106 made contributions to the Joint Fund, the contributions ultimately were earmarked for either the Engineers Fund, which the Joint Fund administered, or for the Central Fund, which it did not administer. By referring to the Joint Fund as a conduit the Central Fund, plaintiff alludes to the Joint Fund's practice of receiving Local 106's contributions earmarked for the Central Fund and transmitting those contributions to that fund.

overpayments.

DISCUSSION

I. Standard for Summary Judgment

Rule 56 allows for summary judgment where the evidence demonstrates that "there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed.2dd 202 (1986). A motion for summary judgment may be granted when the moving party carries its burden of showing that no triable issues of fact exist. Thompson v. Gjivoje, 896 F.2d 716, 720 (2d Cir. 1990). In light of this burden, any inferences to be drawn from the facts must be viewed in the light most favorable to the non-moving paerty. Id.; United States v. Diebold, Inc., 369 U.S. 654, 82 S. Ct. 993, 994, 8 L.Ed.2d 176 (1962) (per curiam). If the moving party meets its burden, the burden shifts to the non-moving party to come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A dispute regarding a material fact is genuine "if evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248, 106 S. Ct. at 2510. When reasonable minds could not differ as to the import of the evidence, then summary judgment is proper. Id., at 250-251, 106 S. Ct. at 2511.

I. *Res Judicata*, Collateral Estoppel, and Claims 14 to 21.

Defendants note that in Mayes I, plaintiff attempted to raise claims fourteen through twenty-one in a proposed second amended complaint, which the court denied him leave to file. *See* Mayes v.

Local 106, Intern. Union of Operating Engineers, No. 86-CV-41, 1992 WL 335964 (N.D.N.Y. Nov. 12, 1992) (denying plaintiff leave to amend because his proposed amendments were offered considerably past the Rule 16 deadline for amendments). Relying upon Qualicare-Walsh, inc. v. Ward, 947 F.2d 823 (6th Cir. 1991) and Johnson v. SCA Disposal Services of New England, 931 F.2d 970 (1st Cir. 1991), among other cases, defendants submit plaintiff's failure to appeal this denial after final judgment had been rendered in his underlying case means plaintiff should be barred on grounds of *res judicata* and collateral istoppel from raising his unsuccessfully proposed claims in a subsequent complaint–i.e., a complaint in a newly filed action.

Under other circumstances, defendants' argument would be appealing; but where, as here, plaintiff was denied leave to file his proposed second amended complaint because the pre-trial deadline for making such amendments had lapsed, meaningn there never had been a "full and fair opportunity" for the court to entertain the merits of his newly proposed claims, the interests of justice favor examination of these claims. *See, e.g.*, Nilson v. City of Point Moss, Miss., 701 F.2d 556, 565 (5th Cir. 1983) (*en banc*) (Wisdom, J. dissenting) ("there is no basis for the application of [*res judicata* or collateral estoppel] unless the plaintiff has a 'full and fair opportunity' to litigate his claim"). Accordingly, the court turns to plaintiff's allegations.

III. Civil RICO Claims

As may be commonly known, RICO makes it a crime "to conduct" an "enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. Section 1962(c). RICO, however, also contains a civil provision permitting "[a]ny person injured in his

business or property by reason of a violation" of its criminal components to recover treble damages and attorney's fees. 18 U.S.C. Section 1964(c). Of the thirty-three discrete causes of action plaintiff has alleged, plaintiff has included a civil RICO claim in all but the first. The threshold issue is whether plaintiff has standing to prosecute his civil RICO claims.

A plaintiff cannot bring a civil suit under RICO, in a personal capacity, where he alleges has been incurred by a union of which he is a member and any derivative injury to him is no different from that sustained by similarly situated members of the same union. *See* Bass v. Campagnone, 838 F.2d 10, 12 (1st Cir. 1988); Adams-Lundy v. Ass'n of Pro. Flight Attendants, 844 F.2d 245, 250 (5th Cir. 1988). *See also* Pappas v. Passias, 887 F. Supp. 465, 470 (E.D.N.Y. 1995); Scivally v. Graney, No. 92-11688-Z, 1993 WL 207758, at * 2 (D. Mass. Jun. 7, 1993) (holding the same). Turning to plaintiff's RICO claims, it is evident he lacks standing to argue most of them because the injuries he alleges, rather than being unique to him, would be the type suffered by Local 106 as a whole.

Specifically, plaintiff's second through twelfth causes of action allege various unauthorized pension overpayments, benefitting defendants, that were made to the Joint Fund. His thirteenth cause of action alleges certain defendants improperly hired retired members of Local 106 to work as instructors at the Westerlo facility, while his fourteenth claims these defendants conspired to sell the Westerlo facility for less than its proper market value and facilitated an illegal work stoppage. In his fifteenth causes of action, plaintiff submits LaBarge granted union membership to persons not qualified to be in the union; in his sixteenth, he accuses defendants of an improper ballot initiative undertaken to create a new union defense fund. Cause of action

seventeen states various defendants were responsible for the filing of inaccurate reports required under the Labor-Management Reporting and Disclosure Act of 1959, and cause of action nineteen charges that LaBarge coerced defendant James Tommaney into the prospective sale of the Westerlo site.

Causes of action twenty and twenty-one each allege certain defendants committed improprieties in the proposed sale of the Westerlo facility, while number twenty-two contends improper payments were authorized to the Joint Fund. Five more causes of action, numbered twenty-one to twenty-eight and thirty-one, allege various defendants filed false reports with the Joint Fund and allowed overpayments into their pension fund. Cause of action twenty-nine contends defendants did not keep proper payroll records, establish a basic wage rate for union employees, or have a procedure in place to check time cards for claims of overtime, and cause number thirty asserts that as of the date the amended complaint was filed, defendants still were receiving unauthorized pension contributions. Finally, causes of action number thirty-two and thirty-three allege improprieties in the compilation and filing of overtime reports.

Plaintiff submits these "predicate act[s]" caused harm to his union membership, which he repeatedly asserts "is[a] property to be protected as much as a valuable chattel." *See, e.g.,* Amend. Compl. at P.26. His assertion misses the point, however; if true, these specific predicate acts he alleges did not injure him alone, but injured Local 106 as a whole. Although the union might have standing to raise these claims, plaintiff does not.

Yet, even with those civil RICO claims where he alleges an injury unique to him, plaintiff cannot prevail as these injuries are neither cognizable nor compensable under RICO. In causes of action numbered fourteen, sixteen, nineteen through twenty-one,

twenty-three and thirty-three, plaintiff contends various defendants violated RICO when they failed to respond to his requests for records or to answer his letters. To state a claim under RICO, plaintiff must allege injury to business or property be reason of a RICO violation. 18 U.S.C. Section 1964(c). Under civil RICO, plaintiff may not recover for speculative losses or where amount of damages is unprovable, because the purpose of a civil RICO award is to return plaintiff to the same financial position he would have enjoyed absent illegal conduct. Trustees of Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mechanical, Inc., 886 F. Supp. 1134, 1146 (S.D.N.Y. 1995). Unquantifiable harm to union membership, as he alleges, is not actionable under civil RICO. Nor is personal injury, such as to reputation or for emotional distress, generally considered an injury to business or property that is compensable under RICO. *See, e.g.,* City of Chicago Heights, Ill. v. Lobue, 914 F. Supp. 279, 285 (N.D. Ill. 1996); Fleischhauer v. Feltner, 879 F.2d 1290, 1300 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074, 110 S. Ct. 1122, 107 L.Ed.2d 1029 (1990), and *cert. denied*, 494 U.S. 1027, 110 S. Ct. 1473, 108 L.Ed.2d 611 (1990).

Two of plaintiff's civil RICO causes of action do allege personal financial loss. In his fourteenth claim, plaintiff states that he was ordered against his will to participate in an illegal work stoppage against Visconti Construction in 1979. He asserts that had he opted not to join in the work stoppage, it "could [have] result[ed] in loss of work opportunities" and his disobedience would have subjected him to the "threat of economic injury" or economic blackballing. Compl. at P.412. Plaintiff complains that he lost wages from Visconti, who was employing his services at that time, as a result of his participation. In his twenty-fourth cause of action, plaintiff alleges the LaBarge group denied him equal opportunity to work on assignments, causing him to lose more than 150 job

opportunities from October 1980 to present.

As to his coerced work stoppage claim, it is true that lost profits or expectancy damages are recoverable under civil RICO, subject to proof of proximate causation and proof that damages are not speculative. Frankford Trust Co. v. Advest, Inc., 943 f. Supp. 531, 532 (E.D. Pa. 1996); Sound Video Unlimited, Inc. v. Video Shack Inc., 700 F.Supp. 127, 142 (S.D.N.Y. 1988). The problem with this claim is that plaintiff's opportunity to raise it has long since lapsed. RICO does not state what limitations period governs the filing of civil RICO claims, but in Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 156, 107 S. Ct. 2759, 2767, 97 L.Ed.2d 121 (1987), the Supreme Court held such actions are subject to the four-year limitations period contained in the Clayton Act. Plaintiff filed this action in 1993, or about a decade too late for him to bring this instant cause of action under civil RICO.

Plaintiff's claim he lost the opportunity to work on 150 job assignments presents a different problem. Although this is the type of compensable injury contemplated by civil RICO, this claim ultimately fails. As defendants counter, plaintiff does not explain how his alleged loss of job opportunities amounted to the required predicate acts to support a civil RICO claim. In other words, they argue this particular RICO claim should be dismissed for failure to plead predicate acts constituting a "pattern of racketeering activity." "Pattern of racketeering activity" is a term of art under the RICO statute and it requires plaintiff to plead at least two predicate acts of "racketeering activity" that have occurred within ten years of each other. 18 U.S.C. Section 1961(5). These two predicate acts must be "related and . . . amount to, or pose a threat of continuing criminal activity." GICC Capital Corp. v. Tech. Fin. Group, Inc., 67 F.3d 463, 465 (2d Cir. 1995) (citation omitted). "Racketeering

activity," in turn, is defined as an act which violates any of the state or federal laws *specifically enumerated* in the RICO statute. 18 U.S.C. Section 1961(1). In his twenty-fourth cause of action, plaintiff predicates his RICO claim on his loss of job opportunities, but does not explain how this loss of opportunities constituted "racketeering activity."[5] Summary judgment is appropriate for plaintiff's RICO claims.

IV. Plaintiff's ERISA Claims

Plaintiff raises ERISA claims in his second through twelfth, fifteenth, nineteenth through twenty-third, and twenty-fifth through thirty-second causes of action. Defendants respond that these causes of action must be dismissed because in each instance the statute of limitations has run, and, in any event, the acts complained of were not fiduciary acts under ERISA. Defendants also question whether plaintiff enjoys standing to sue in his individual capacity for compensatory damages.

Causes of action two through twelve allege LaBarge, a trustee of both the Engineers Fund and the Joint Fund, violated ERISA under 29 U.S.C. Section 1104 and 1132 when he permitted various overpayments to be made to the Joint Fund from January 1981 through March 1986. These causes of action fail for two reasons: (1) they are untimely under the applicable statute of

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Plaintiff's instant claim suffers from at least two other problems. First, the claim clearly faces statute of limitation problems, as he maintains he has lost job opportunities dating back to 1980; second, the claim sounds suspiciously similar to the exact loss of job opportunity claim that was raised, tried and found not to be valid in Mayes I.

limitations; and (2), even had the allegations been raised in a timely manner, the court finds that LaBarge was not acting as a fiduciary of either the Engineers Fund or Joint Fund when he was authorizing payments into those pension funds.

The causes of action plaintiff enumerates all occurred prior to December 31, 1987, when ERISA's governing statute of limitations was amended. *See* 29 U.S.C. Section 1113. Claims accruing prior to the date of the amendment are subject to the former statute of limitations. *See* International Ass'n of Machinists and Aerospace Workers v. Rome Cable Corp., 810 F.Supp. 402, 409 9N.D.N.Y. 1993) (Scullin, J.). The former statute of limitations established a six-year limitation period in which to initiate an action, measured from the date of the last action constituting a breach or violation. The statute provided two exceptions to the six-year limitation period, however, and set a limit of three years where a plaintiff either had actual knowledge of a breach or violation, or had obtained a report from which he reasonable could have been expected to have obtained knowledge of an alleged breach or violation. *See, e.g.,* Dasler v. E. F. Hutton & Co., 694 F. Supp. 624, 632 (D. Minn. 1988). If the six-year statute of limitations is applied, then, considering the fact that the date of the last alleged breach against LaBarge was in March 1986, plaintiff's causes of action two through twelve would be barred because he did not file this action until June 3, 1993.

The court, however, applies the three-year statute of limitations, accruing from the date when plaintiff had obtained a report from which he reasonably could have expected to have obtained knowledge of the ERISA violations he alleges. By his own admission, he received copies of microfilmed pension records on September 27, 1989. Amend. Compl. at P. 388. Applying the three-year statute of limitations, plaintiff had until September 27,

1992 to file a complaint alleging these causes of action. He did not; his ERISA claims in causes of action two through twelve are time-barred.

Even if these ERISA causes of action had been timely, they must fail. LaBarge was not acting as a fiduciary of either the Engineers Fund or Joint Fund when he was authorizing alleged overpayments into those pension funds. "ERISA permits employers to wear 'two hats,' and . . . they assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA." Belade v. ITT Corp., 909 F.2d 736, 738 (2d Cir. 1990) (citations omitted). Employers generally act as fiduciaries within the meaning of ERISA only when fulfilling certain defined functions, such as the exercise of discretionary authority or control over plan management or administration. Siskind v. Sperry Retirement Program, 47 F.3d 498 505 (2d Cir. 1995). In this instance, LaBarge's actions fdid not give rise to any fiduciary duty under ERISA because he did not exercise authority or control over the management or administration of either the Engineer Fund or Joint Fund: his actions simply augmented contributions made to these funds. *See, e.g.,* Geller v. County Line Auto Sales, Inc., 86 F.3d 18, 21 (2d Cir. 1996) (noting mere calculation of benefits not fiduciary function because person performing such task "does not have discretionary authority or discretionary control respecting management of the plan, does not exercise any authority or control respecting management or disposition of the assets of the plan, and does not render investment advice with respect to any money or other property of the plan and has no authority or responsibility to do so.") *Cf.* Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992), *cert. denied,* Henss v. Martin, 506 U.S. 1054, 113 S. Ct. 979, 122 L.Ed.2d 133 (transaction allegedly primarily benefitting employer's

controlling stockholder and sapping corporation's financial strength, but not involving actual assets of employee stock ownership plan, not subject to fiduciary duty strictures of ERISA).

The ERISA claims plaintiff raises in his fifteenth, nineteenth through twenty-third, and twenty-fifth through thirty-second causes of action also must fail. Plaintiff's fifteenth cause of action alleges LaBarge granted union membership to unqualified individuals from 1982 through January 1986. Not only is this claim barred by the applicable statute of limitations, as explained *infra*, but it also fails to state a claim under the ERISA statutes. *See* Geller, 86 F.3d at 21. His nineteenth cause of action, which alleges defendant James Tommaney failed to respond to a letter plaintiff penned on August 12, 1987, fails for the same reasons. Claims twenty-one and twenty-two accuse defendants Gordon Kilby and Gene Hallock, respectively of agreeing to allow LaBarge to sell the Westerlo facility during a union trustee meeting on January 7, 1985 and refusing to respond to plaintiff's August 12, 1987 letter. Again, these claims–even if valid–clearly are untimely.

Plaintiff's twenty-second and twenty-third ERISA causes of action content that officials of the Joint Fund and the LaBarge group accepted allegedly unauthorized contributions into the Joint Fund from 1981 through March, 1986. Again, these causes of action are time-barred and fail to state cognizable ERISA claims. ERISA causes of action twenty-five through thirty-two also must be dismissed. These claims alleged that from December 1990 through November 1992, defendants Diane O'Hare, John J. Kellogg and Gene Messercola, *inter alia*, permitted unauthorized constributions to be made to the pension funds and filed reports that did not reflect such contributions had been made. These allegations simply do not state a claim under ERISA. Id.

V. Plaintiff's LMRDA Claims

Plaintiff raises causes of action under two sections of the LMRDA: 29 U.S.C. Sections 411(a)(1) and 501(c). Section 501(c), entitled "Embezzlement of assets; penalty," permits criminal proceedings against officers of the labor organizations who embezzle funds from such entities, but does not provide a private cause of action for a plaintiff in a civil suit.[6] Rather, the court infers that plaintiff, who was litigating *pro se* when he drafted his amended complaint, intended to bring these causes of action under Section 501(b), which permits a union member to file suit against officers, agents, shop stewards or representatives to secure an accounting or other appropriate relief for a labor organization when: (1) an officer, agent, shop steward or representative violates the fiduciary duties described in Section 501(a); and (2) the labor organization, its governing board or officers "refuse or fail to sue or recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." 29 U.S.C. Section

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Section 501(c) reads:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

501(b).[7] Section 501(b), however, expressly provides that "[n]o such proceeding shall be brought except upon leave of the court obtained from verified application and for good cause shown, which application may be made ex parte." Id. Plaintiff has not followoed this mandate: he simply raises Section 501(b) allelgations in his complaint, which is not procedurally permissible under that statute. His Section 501(b) LMRDA claims must be dismissed.

Although plaintiff raises Section 411(a)(1) LMRDA claims in his second through twenty-first, twenty-six through twenty-eighth, and thirty-first cause of action, he correctly concedes t hat causes of action two through twenty-one are time-barred. *See* Plf's Mem. of Law at 50. Federal courts apply to such LMRDA claims the statute of limitations that a state court within the federal court's district would apply to the most closely analogous state-law claims, which in New York is three years. *See, e.g.,* Ellis v. Civil Service Employees Ass'n, Inc., Local 1000, 913 F. Supp. 684, 687 (N.D.N.Y. 1996) (McAvoy, C.J.). The Section 411(a)(1) allegations plaintiff raises in his second through twenty-first causes of action all occurred prior to three years before June 3, 1993–the date he filed this lawsuit–and are time-barred.

The LMDRA claims he raises in his twenty-sixth through twenty-eighth and thirty-first cause of action are timely, but fail to state a claim. In each cause of action, plaintiff alleges defendant Kellogg permitted unauthorized overpayments into pension funds in violation of Section 411(a)(1). Section 411(a)(1) is part of Title 1 of the LMRDA, which provides union members with an exhaustive

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"*Pro se* complaints . . . are held 'to less stringent standards than formal pleadings drafted by lawyers." Bass v. Jackson, 790 F.2d 260, 262 (2d Cir. 1986).

"Bill of Rights" enforceable in federal court and is designed to guarantee every union member equal rights to vote and otherwise participate in union decisions, freedom from unreasonable restrictions on speech and assembly, and protection from improper discipline. Local No. 82. Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousement and Packers v. Crowley, 467 U.S. 526, 536, 104 S. Ct. 2557, 2563, 81 L.Ed.2d 457 (1984). In particular, the statue reads:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

29 U.S.C.Section 411(a)(1).

Section 411(a)(1) is not a "catch-all." *See* Phelan v. Local 305, 973 F.2d 1050, 1055 (2d Cir. 1992), *cert. denied*, 507 U.S. 972, 113 S. Ct. 1415, 122 L.Ed.2s 785 (1993) (*citing* Abrams v. Carrier Corp., 434 F.2d 1234, 1250 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009, 91 S. Ct. 1253, 28 L.Ed.2d 545 (1971). It clearly was not intended to be applied in the situation that plaintiff alleges: i.e., where a defendant allegedly makes overpayments into a pension fund. Such activity is entirely unrelated to union democratic rights and summary judgment is appropriate for plaintiff's LMRDA Section 411(a)(1) causes of action.

VI. Plaintiff's FLSA Claims

Plaintiff raises extraordinarily vague FLSA claims in his amended complaint. For example, he asserts in his twenty-sixth cause of action that:

> the reporting of and payment of[] any hour of overtime, into a Pension Fund Trust where the per hour "basic rate" required by the Fair Labor Standards Act, was not paid to that salaried Union employee, is a violation of the Fair Labor Standards Act, 29 U.S.C. Secs. 201-219, and ERISA, Sec. 1104, 1132.

Amend Compl. at P. 675.

How this alleged activity, for example, violates 29 U.S.C. Section 208, entitled "Wage orders in American Samoa," admittedly intrigues the court, but plaintiff's amended complant is *sans* explanation. His shotgun approach to litigation cannot be countenanced and the court dismisses these obviously frivolous claims under the FLSA that appear to have been added as an afterthought.

VII. Plaintiff's LMRA Claims

Plaintiff asserts Section 301 LMRA claims in his first, fourteenth, seventeenth, eighteenth, twentieth, twenty-first and twenty-third causes of action, many of which defendants maintain are time-barred. Congress did not provide a statute of limitations for suits brought under Section 301, so this Court determines the statute of limitations for the federal cause of action by looking to

the most appropriate state statute of limitations. *See* Harry Hoffman Printing, inc. v. Graphic Communications, Int'l Union, Local 261, 912 F.2d 608, 612 (2d Cir. 1990). Which analogous state statute of limitations applies depends upon the nature of the cause of action under scrutiny.

Plaintiff asserts correctly (as the court discusses *supra*) that New York's six-year statute of limitations for breach of contract as set forth in C.P.I.R. Section 213(2) applies to his LMRA claims, and he concedes in his first and fourteenth LMRA causes of action–which accrued in 1980 and 1979, respectively–are time-barred. *See* Plf's Mem. of Law at 52, n. 28. His eighteenth cause of action, which accrued in 1984, clearly is untimely, too. As to plaintiff's remaining LMRA claims, the court examines them *seriatim*.

Plaintiff's seventeenth cause of action alleges defendant Kellogg violated the LMRA when he breached the CBA by failing to respond to plaintiff's December 6, 1990 letter requesting "the most recent report" for the Board of Trustees Local 106 Training and Apprenticeship Fund. Amend. Compl. at P. 435. Assuming *arguendo* this cause of action is timely, it fails to state a claim under the LMRA. "[A] suit properly brought under Section 301 must be a suit either for violation of a contract between and employer and a labor organization representing employees in an industry affecting commerce or for violation of a contract between such labor organizations." Wooddell v. International Bhd. of Elec. Workers, Local 71, 502 U.S. 93, 98, 112 S. Ct., 494, 498, 116 L.Ed.2d 419 (1991). Such is not the case here: plaintiff, who obviously is not a labor organization, merely is suing his employer, e.g., his local union, for breach of contract. *See* Office Employees Int'l Union v. NLRB, 353 U.S. 313, 316, 77 S. Ct. 799, 801, 1 L.Ed.2d 846 (1957) (local union is plaintiff's employer within the

meaning of federal labor law). "A simple employment contract is not within the scope of Section 301, even when the employer is a union," because "it is neither a contract between an employer and a labor organization nor a contract between two labor organizations." Korzen v. Local Union 705, International Brotherhood of Teamsters, 75 F.3d 285, 288 (7th Cir. 1996) (*citing* Kunz v. United Food & Conmmercial Workers, 5 F.3d 1006, 1009 (6th Cir. 1993)).[8] The LMRA is not the proper vehicle for plaintiff to bring the

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[8] As Judge Posner posited in Korzen:

> Union constitutions have been held to be contracts within the scope of section 301 and members of the union held entitled to sue to enforce the contract-constitution as third-party beneficiaries. United Ass'n of Journeymen & Apprentices v. Local 334, 452 U.S. 615, 101 S. Ct. 2546, 69 L.Ed.2d 280 (1981); Wooddell v. international Brotherhood of Electrical Workers, 502 U.S. 93, 112 S. Ct. 494, 116 L.Ed.2d 419 (1991); Shea v. McCarthy, 953 F.2d 29, 30-31 (2d Cir. 1992). But in each of these cases it was the constitution of an international union that was at issue, and an international union is plausibly conceived of as a contractual union of its locals. Wooddell and Shea do not emphasize the international character of the unions whose constitutions were in issue in those cases, but it is plain from the Journeyman case, which established the principle that a union's constitution can be a contract between labor organizations within the meaning of section 301, that the basis for it is the fact than an international's constitution is a contract between the international and its local. 452 U.S. at 620-23, 101 S. Ct. at 2549-51. The constitution of a local union, in contrast, is a contract between the union and its members, Talton v. Behncke, 199 F.2d 471, 473 (7th Cir. 1952); Simoni v. Civil Service Employees Ass'n., Inc., 133 Misc.2d 1, 507 N.Y.S.2d 371, 377 (S. Ct. 1986), in the same

claim he raises in his seventeenth cause of action.

Nor is the LMRA a proper vehicle for the other putative LMRA breach of contract claims plaintiff raises. Claims twenty and twenty-one mirror claim seventeen; in those claims, plaintiff contends Kilby and Hallock, respectively, are liable for breach of contract under the LMRA for "refusing and/or failing to respond to plaintiff's letter of August 12, 1987." Amend. Compl. Pages 489, 517. Claim twenty-three alleges defendant Van Dyke is liable for breach of contract under the LMRA for concealing "'wrong[]doing by Local 106 Union officials" from plaintiff. Id. at P. 643. None of these claims passes muster under Korzen.

Although the LMRA cannot be the basis for plaintiff's instant claims for breach of contract under state common law, theoretically this court could exercise supplemental jurisdiction over them. *See* 28 U.S.C. Section 1367. The federal claims to which these state claims are a supplement are being dismissed, however, therefore the proper course is to relinquish jurisdiction over the state law claims so as to minimize federal judicial intrusion into an area of state law. *See* 28 U.S.C. Section 1367(c)(3)1367; Castellano v. City of New York, 142 F.3d 58, 74 (2d Cir. 1998). Accordingly, the court will not entertain plaintiff's supplemental state law claims. *See, e.g.,* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 109,

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> way that a corporate charter is a contract between the corporation and its shareholders (as well as between the state and the corporation and among the shareholders). Staar Surgical Co. v. Waggoner, 588 A.2d 1130, 1136 (Del. 1991). A suit on a contract between a labor organization and a member is not within the scope of section 301.

Id.

61 S. Ct. 868, 872, 85 L.Ed. 1214 (1941) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confined their own jurisdiction to the precise limits which the statute has defined.")

VIII. Plaintiff's Remaining Miscellaneous Claims

Among the sundry miscellaneous claims he raises, plaintiff alleges various defendants violated the Hobbs Act as well as other criminal statutes, largely in connection with his RICO claims. He also raises other statutory claims, including those arising under the 29 U.S.C. Section 157, popularly known as the Taft-Hartley Act. The court has examined these claims and they are without merit.

CONCLUSION

Based upon careful review of the foregoing, defendants' motion for summary judgment is **GRANTED** and, as the court will not entertain plaintiff's supplemental breach of contract state common law claims, the plaintiff's complaint is **DISMISSED. IS IS SO ORDERED.**

DATED: February 5, 1999
Syracuse, New York

/s/NEAL P. McCURN
SENIOR U.S.D.J.

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APPENDIX B

UNITED STATE COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

As a stated term of the United States Court of Appeals for the Second Circuit, held at the United State Courthouse, Foley Square, in the City of New York, on the 18th day of Nov., one thousand nine hundred and ninety-nine.

Present: HONORABLE RALPH K. WINTER,
Chief Judge,
HONORABLE RICHARD J. CARDAMONE,
HONORABLE CHESTER J. STRAUB,
Circuit Judges.

GEORGE A. MAYES,

Plaintiff-Appellant,

- v. - No. 99-7283

LOCAL 106, INTERNATIONAL UNION OF OPERATING ENGINEERS, JANE M. LABARGE,(former) Office Manager, WILLARD J. LABARGE,(former) Business Manager, RICHARD C. KOSITZKA, (former) Treasurer, JAMES F. TOMMANEY, (former) Treasurer, JOHN J. KELLOGG, (former) President and Treasurer, FRANK LOMIO, Local 106 Coordiner, DIANE O'HARE, Office Manager, GORDON M. KILBY, Local 106 Training Fund Trustee, EUGENE HALLOCK, Local 106 Training Fund Trustee, GENE MESSERCOLA, Business Manager, ROBERT VAN DYKE, Plan Administrator, Engineers Joint Benefit Funds,

Defendants-Appellees.

Appearing for Appellant: George A. Mayes, pro se, Warrensburg, New York.

Appearing for Appellees: Richard P. Walsh, Jr., Lombardi,

Reinhard, Walsh & Harrison,
P.C., Albany, New York.

Appeal from the United States District Court for the Northern District of New York (McCurn, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

George Mayes appeals from Judge McCurn's adverse grant of summary judgment. We affirm for substantially the reasons stated by the district court. See Mayes v. Local 106, No. 93-CV-716, 1999 WL 60135, at. *1-10 (N.D.N.Y. Feb. 5, 1999).

As to appellant's claims under the Taft-Hartley Act, 29 U.S.C. Section 157, the district court dismissed them without discussion, concluding they had no merit. See Mayes, 1999 WL 60135, at *10. We agree. We note, however, that it is unclear whether district court even had jurisdiction over these claims because they are essentially unfair labor practice claims and "the national Labor Relations Board generally has exclusive jurisdiction over unfair labor practice claims." Brown v. Volante Corp., — F.3d — , No. 99-7109, 1999 WL 807724, at *2 (2d Cir. Oct. 8, 1999) (citing NLRB V. Katz, 369 U.S. 736, 743 (1962)); see also Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 543 n.4 (1988) ("As a general rule, federal courts do not have jurisdiction over" unfair labor practice claims. (Internal quotation marks omitted)).

We reject appellant's contention on appeal that some of his time-barred claims can be resurrected based on a "continuing violation" theory. Appellant neither pled nor alleged prior to this appeal that these claims were "ongoing violations." In addition, as discussed by the district court, several of the time-barred claims fail on the merits regardless.

We also reject appellant's argument concerning futility with respect to his claims pursuant to Section 501(b) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. Section 501(b). See Coleman v. Bhd. of Ry. & S.S. Clerks, 430 F.2d 206, 208 (2d Cir. 1965) (request requirement is "mandatory and . . . cannot be met by anything short of an actual request [to sue] . . . .

[and a]n allegation of the futility of such request will not suffice"); see also Dinko v. Wall, 531 F.2d 68, 72-73 (2d Cir. 1976) (reiterating Coleman holding).

Finally, we reject appellant's contention that the motion to dismiss was improperly converted to a motion for summary judgment. A district court may treat a motion to dismiss as a motion for summary judgment provided that "all parties [are] given [a] reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b). Appellant, who was represented by counsel during the relevant time period, was given adequate notice and a reasonable opportunity to present additional evidence.

We therefore affirm.

FOR THE COURT:
KAREN GREVE MILTON, Acting Clerk

/s/Lucille Carr 11/18/99

By: Date

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APPENDIX C

FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th day of Feb. two thousand.

Mayes, et al

v. Dkt. No: 99-7283

Local 106, et al

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant George Mayes.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON, Acting Clerk

By: _____
/s/Beth J. Meador,
Administrative Attorney

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APPENDIX D

99-7283

STATEMENT OF ISSUES

1. Whether, as Plaintiff-Appellant: George A. Mayes, also known as, A/K/A "Mickey Mayes" (hereafter Mayes) has alleged, Defendant- Appellee Willard J. LaBarge (hereafter LaBarge) committed a federal statute offense, when under the powers of his office as Business Manager of Local 106 Union, he caused the compiling and preparation of the Contractors Pension Report Form (hereafter Report Form) for himself and Union staff employees, for the pay period beginning December 24, 1980, which contained false information in a record required to be recorded and kept under a different federal statute, and therefore violated said statute.
2. Whether, as Mayes has alleged, this above identified act of

LaBarge also constitutes an act of embezzlement where LaBarge by his powers of his Union office also caused checks to be drawn on the Local 106 Union Treasury, to be forwarded through the United States Postal Service, with the false Report Form, which contained unauthorized sums of money to be channeled into his own personal pension fund, and also others who Mayes alleges are co-conspirators, and/or aiders and abetters.

3. Whether, as Mayes has alleged, LaBarge did knowingly and willingly, commit the above identified acts in violation of more than one federal statute, with the full knowledge that any such expenditure of Union funds must first be submitted to the Local 106 Union Executive Board for approval and thereafter also ratified by the membership at its next subsequent meeting, as required by the Local 106 Union Constitution and By-Laws.

4. Whether, as Mayes has alleged, the named Local 106 Union President and named Treasurer, by their acts of validating checks drawn on the Local 106 Union Treasury, in payment of unauthorized amounts of money paid with the Report Forms, and which were also channeled into their individual pension fund account or accounts as the case may be, did so, with the intent to further the federal statute violation act of the principal, LaBarge.

5. Whether, as Mayes has alleged, DefendantAppellee Jane M. LaBarge, as Local 106 Union Office Manager and Dispatcher, who was appointed such by her husband, LaBarge, in 1980, did assist, direct or supervise the compiling and preparation of the Report Forms, where she also would know said Report Forms would ordinarily be sent through the Postal Service, and which she had personal knowledge of the fact that the alleged amounts of unauthorized amounts of money that would be drawn from the Local 106 Union Treasury, some of which was for her personal benefit and by the Union check and false Report Form, would be

channeled into her personal pension account, or accounts as the case may be, thereby indicating that she wished to see the wrongful acts of LaBarge fulfilled as an aider and abettor.

6. Whether, as Mayes has alleged, Defendant-Appellee Diane 0' Hare did assist, direct or supervise the compiling and preparation of the Report Forms, where she also would know said Report Forms would ordinarily be sent through the Postal Service, and which she had personal knowledge of the alleged amounts of unauthorized amounts of money that would be drawn from the Local 106 Union Treasury, some of which was for her personal benefit and by the Union check and false Report Form, would be channeled into her personal pension account or accounts as the case may be, thereby indicating that she wished to see the wrongful acts of her boss, LaBarge, fulfilled as an aider and abettor.

7. Whether, as Mayes has alleged, 0' Hare was a beneficiary and recipient of unauthorized sums of money that were channeled into her personal pension fund account or accounts, as the case may be, that began with the pay period of December 24, 1980 and did continued to June 3, 1993, the date of the filing this civil action and therefore such ongoing and continuing violation has, with others also, tolled the statute of limitations.

8. Whether, as Mayes has alleged , a conspiracy was formed by LaBarge, Jane M.LaBarge and others -that Mayes has identified as the "LaBarge Group" in the fall of 1979, where an overt act of causing about 400 supporters to picket the Local 106 Union Hall at 1044 Broadway, for the express purpose, as stated by LaBarge to Mayes at the scene, "to shut down the operation of the Union hall and force Business Manager Moran to resign, so he (LaBarge) could take over as Business Manager."

9. Whether, as Mayes has alleged, that the "LaBarge Group" conspirators, co-conspirators, aiders and abettors, by said

conspiracy, did control Local 106 as an enterprise for their own benefit, re-election to office or appointment to positions, and to control the members employment so as to reward their supporters and punish their enemies, where Mayes had been declared an enemy by LaBarge.

10. Whether Mayes, as a member in good standing of Local 106 Union since July 1954, is in fact an employee of Local 106 Union, as the Court's MDO 2/05/99 states he is, where actually the last payroll employment of Mayes as a Local 106 Business Agent, was terminated by being fired by LaBarge in September, 1980.

11. Whether, as Mayes has alleged the many acts of LaBarge, his successor, Defendant-Appellee Kellogg and his successor, Defendant-Appellee Messercola in causing unauthorized sums of money being drawn from the Local 106 Union Treasury as payment sent through the United States Postal Service, with the many Report Forms which contained false information, that resulted in such unauthorized sums of money being channeled into their individual pension account or accounts, as the case may be, were indictable violations.

12. Whether, the District Court in its Memorandum-Decision and Order of February 5, 1999 properly granted the named Defendants Summary Judgement, where Mayes has amply alleged the Defendants' state of mind and intent were such as to create material fact questions for a jury, particularly where Mayes has been denied even a scintilla of discovery by Order of Magistrate Judge Ralph W. Smith. 10/22/93.

13. Whether, the Court's MDO of 2/05/99 has properly ruled on the claims of Defendants' statute of limitations, under the federal doctrine of the tolling of the statute of limitations in a situation where the record before the Court evidences the documented deliberate and fraudulent concealment, where one such act is

documented by sworn statements of the named Appellee-Defendants on or about July 3, 1986.

14. Whether, as Mayes has alleged, each act of compiling and preparing said Report Forms that began with the pay period May 27, 1981, which reported and paid eight hours of overtime per week of pension fund benefits, for LaBarge, the other officers and office staff employees, where no "time cards or "base wage" written agreements ever existed for these traditionally and admittedly salaried employees, constitutes a violation of a federal statute.
15. Whether, as Mayes has alleged, each act of compiling and preparing Report Forms that reported, at first eight hours of overtime, and later six hours, for the salaried officers and office employees of Local 106 Union that continued even to June 3, 1993, was in fact a continuing violation that related to the question of tolling federal statutes of limitations.
16. Whether, as Mayes has alleged, the reporting and paying of the extra six hours per week per employee that was commenced under LaBarge as Local 106 Union Business Manager, and continued under each such successor to that office, Jones (deceased), Kellogg and Messercola, until it abruptly stopped about July 1993, shortly after this litigation was filed, is an indication of acknowledging the previous wrong doing.

POINT I
CONSTITUTIONAL QUESTION IN SUMMARY JUDGEMENT

The requirement: that Plaintiff-Appellant Mayes (hereafter Mayes), have standing to bring this action is rooted in Article III of the United States Constitution, which the United States Supreme Court in Allen v. Wright , 468 U.S. 737, 104 S.Ct. 3315, 83 L.Ed.

2d 556, 52 U.S.L.W. 5110 (1984), has noted; "The Art.III doctrine that requires a litigant to have "standing" to evoke the power of a federal court is perhaps the most important of these doctrines. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. Warth v. Seldin , supra, at 498; 422 U.S. 490, 498 (1975) Standing doctrine embraces several judiciously self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigants raising another persons legal rights, the rule of barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked. See Valley Forge , supra, at 474-475; 454 U.S. 464. The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct to be redressed by the requested relief. 454 U.S., at 472." Mayes has alleged that his rights as a member in good standing of Local 106, of the International Union of Operating Engineers, at all relevant times to this action, where many of the violations of such membership rights that are guaranteed by the Constitution-ByLaws of Local 106 Union, has caused him harm in his business or property is action-able before this federal court. Mayes has alleged that these various types of injury set forth in his Amended Complaint did cause injury to his property, as his membership in Local 106 Union is valuable protected property as recognized by the New York Courts. See Amed-Com Par. 42, 446, 506 & 535 and **Index # 1**.

"The right to membership in a union is empty if the corresponding right to an election guaranteed with equal solemnity in the fundamental law of the union is denied. If a member has a

'property right' in his position in the roster, I think he has an equally enforceable property right in the election of the men who will represent him in dealing with his economic security and collective bargaining where that right exists by virtue of express contract in the language of a union constitution." Dusing v. Nuzzo , 29 N.Y.S. 2d 882,884 (Sup. Ct. Ulster Co.) Modified on other grounds and aff'd, 31 N.Y.S. 2d 849 (1941).

In Dusing , the court observed that the rights of union members are as "Real and as needful of equitable protection, surely as money or chattels", 29 N.Y.S. 2d at 884. Therefore, Mayes' claims under Art. III, a right to litigate violations of the Local 106 Union constitution-ByLaws, that have caused him harm to his business - which was his job assignments from the union, that was his sole means of support and/or his property, as his union membership rights are property as recognized by the Courts of New York State. "The concept of property under the Hobbs Act, as developed from its numerous decisions, is not limited to physical or tangible property or things. (United States v. Provenzano , 334 F.2d 678 (3d Cir. 1964), cert. denied, 379 U.S. 947, 85 S.C1.440, 13 L.Ed.2d 544 (1964); United States v. Hedly ,. 255 F.2d 350 (3d Cir. 1958) but includes, in a broad sense, any valuable right considered as a source or element of wealth (Bianchi v. United States , 219 F.2d 182 (8th Cir. 1958) cert. denied, 349 U.S. 915, 75 S.Ct. 604, 99 L.Ed. 2d 129 (1955) and does not depend upon a direct benefit being conferred on the person who obtains the property (United States v. Green) , 350 U.S. 415, 76 S.C. 522, IOOL.Ed.2d 494 (1956).

Mayes has alleged that as a highly skilled heavy equipment operator, that his income from job assignments, which he claims as his business, received from the Local 106 Union hall were his only source of income to support himself and his family from September

1980 to his retirement in January 1988. See Mayes' MOL 1/30/97 p. 18-19 and **Index # 2**.

Mayes believes it was clearly erroneous for the Court to grant Apeallee-Defendants Motion for Summary Judgement where Amended Complaint was filed pro se and there has been no discovery permitted by Order of Magistrate Ralph W. Smith on March 18, 1992. See Docket #65-10/07/93 and **Index # 3** ..

The United State Supreme Court has steadfastly held that complaints filed by pro se litigants, should not be dismissed where there has been no discovery. In Haines v. Kerner , 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 2d 652, the court had noted; "We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards from formal pleadings drafted by lawyers, it appears "beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief," Conley v. Gibson, 355 U.S. 41, 45-46 (1957), See Diocrudi v. During ,- 139 F. 2d 774(CA2 1944). Also noted; "Accordingly, although we intimate no view whatever on the merits of the petitioner's allegations, we conclude that he is entitled to an opportunity to offer proof."

The Supreme Court also noted that; "Construing petitioner's inartful pleading liberally, as Haines v. Kerner , 404 U.S. 519 (1972), instructs federal courts to do in pro se actions . .." Boaq v. Macdougal , 454 U.S. 364, 102 S.Ct. 700, 70 L.Ed. 2d 551 (1982).

The Second Circuit Court in Shea v. McCarthy , 953 F. 2d 29, noted; "Woodell having thus answered in the affirmative the question whether union members may sue their union under section 301(a) for violations of the union constitution, the question we must now answer is whether section 301(a) authorizes similar suit against union officials who perpetrate the constitutional violation. We hold that it does." Mayes claims he therefore has sufficient cause and

legal standing as supported by his verified Amended Complaint, his affidavits with attached exhibits. Therefore, it was clearly erroneous for the Court's dismissal of Mayes' thirty-three Causes Of Action by the MDO of 2/5/99.

POINT II

TOLLING OF THE STATUTE OF LIMITATIONS UNDER FEDERAL RULE OF CONCEALMENT

Plaintiff-Appellant Mayes, has alleged that the specific acts of the Defendants or their Counsel, were acts of deliberate fraudulent concealment. Mayes' former Attorney, Lanny Walter, specifically requested information of the Defendants in plaintiff's First Set of Interrogatories in Civil No. 86-CV-41, dated May 6, 1986. Interrogatory #13, asked specifically; "Does Local 106 have any of the Pension Hour contribution records of other members of Local 106 other than Plaintiff-Mayes?". This is prima facie proof of Mayes' inquiry about the existence and location of Local 106 Union's Pension Report Forms. LaBarge inserted that record into this litigation by his Counsel's Affidavit of July 30,1993. See Walsh Aff.7/30/93, Par.13,14 & his exhibit "C" & "D" attached thereto and **Index # 4**. .

Mayes states a claim that the Appellee's Counsel, Mr. Walsh did affirmatively admit the concealment of the fact, that the pension Report Forms filed by Local 106 Union officials were actually in custody of Local 106 at that time in 1986, where at page 6 of their 10-J statement they declared; " * *, when in his very first set of interrogatories he requested pension records, as well in his third demand for documents. Defendants responded by indicating they did not have custody of these documents, but they were in the custody of the Engineers Joint Benefit in Syracuse." See 10-J Statement, verified by Attorney Richard P. Walsh, Jr.(no date) p 6 and **Index # 5** .

Mayes states a claim that the Appellee's Counsel, Mr. Walsh has also fully admitted the named Defendants concealment where at page 11 of Affidavit of 7/30/93 where he states; "His [Mayes] knowledge was highlighted in 1986, when in the context of his previous lawsuit 86-CV-41, in his very first set of interrogatories, plaintiff asked for pension documents. In July of that year, he was informed where they were and it was he who waited until 1989 to obtain said documents. " This documented admission that the named Apellee-Defendants had lied about having such custody , by Attorney Walsh is binding on all the named Appellee-Defendants. See Walsh Aff. 7/30/93 p. 13 & 14 and **Index # 6** .

The claimed fraudulent concealment is prima facie documented by the verified answers of defendants given by LaBarge and 0'Hhare to Mayes' Interrogatory # 13 as being; "Does Local 106 have custody of the Pension Hour Contribution records of plaintiff [Mayes]?" Answer: "No"." This document was signed by Attorney Richard P. Walsh, Jr. on July 3, 1986. See Affidavit of Attorney Walsh, September 30, 1996, at paragraph 28 and **Index # 7** .

Please note for the record, that at the time in 1986 these answers were given by verification of LaBarge's and 0 ' Hare's Attorney, but later, by request and insistence of Mayes' Attorney Lanny Walter, the sworn to verification was provided at a later date. See **Index # 8** .

Another fraudulent concealment, was also alleged by Mayes in his 18th Cause of Action. See Amed-Comp Par. 451-452, **Index # 9** , and Mayes' Aff 9/07/93, Par. 48-54, **Index # 10** .

Another act of deliberate fraudulant concealment is documented by Defendant's Counsel, Mr. Jordan, in a court document of 2/01/88. See **Index # 10a.**

Mayes has alleged other acts of deliberate fraudulent

concealment. For instance, in his Cause of Action 17, Mayes has alleged that Appellee John J. Kellogg, (hereafter Kellogg) as a member of the Board of Trustees of the Local 106 Union Training and Apprenticeship Fund, a Trust Fund set up under ERISA, refused to answer Mayes' certified mail request, as Mayes was a contributor and beneficiary of said Fund, for information about the Training Fund's filing of its Form 990 Reports under Federal Employer 1.D. #22-2549231, where the IRS had reported none had been filed. Kellogg had superior knowledge that even though Employer 1.D. #22-2549231, was at various times used to file Training Fund Form 990 Reports, -that a new and different Employer I.D. Number had been used for the years Mayes made inquiry of. See Amed-Comp. Par. 434-446 and **Index # 11**. . See also Mayes letter 12/03/90 and **Index #12.**

Additionally, Mayes has alleged that the wilful and knowingly signing of the Local 106 Amended LM-2 reports for years 81- 85 which contained, among other things, the information taken from the false pension Report Forms for those specific years. Apellee-Defendant John J. Kellogg, (hereafter Kellogg), signed each of the Amended LM-2 Reports for the years of 1981, 1982, 1983, and the regular Reports for 1984 and 1985, knowingly and willfully with criminal intent to violate the Labor-Management Reporting and Disclosure Act of 1959, as amended, in such signing of each Labor Organization Annual Report Form L-M2. See Amed-Comp. Par. 448 to Par. 452 and **Index # 13.**

The Second Circuit in United States v. Tolkow ,532 F. 2d 853 (2d Cir. 1976) noted; "The proof of appellants culpable disregard of the reporting obligations was more than sufficient. Each report contained notification of the statutory duty above the space where appellant signed his name, and as we previously observed, appellant's signature on the reports is

prima facie proof of his knowledge of their contents. " And did further note; " Each report bore appellant's signature; that signature was prima facie proof of his knowledge of their contents. United States v. Romanow ,505 F. 2d 813 (1st Cir. 1974) (conviction of willfully making false material declaration on a tax form); United States v. Bath , Bath .504 F. 2d 456, 460 (10th Cir. 1974) (conviction of, inter alia, knowingly reporting union money payments to hired pickets as "strike benefits".); I Wharton's Criminal Evidence Sec. 117, p.1969,13th ed. 1972)."

Mayes has alleged Kellogg's wilful acts are a violation under RICO 18 U.S.C. Section 1961(c), 1964(c), and was a breach of contract under 301 (a) LMRA 29 U.S.C. Section 185 (a). See Amed-Com. Par. 451 at Index # 13. [same above]

Mayes has alleged that the wilful acts of signing the amended LM-2 Reports was also a RICO conspiracy act in furtherance of the "LaBarge Group" controlling Local 106 as a RICO "enterprise" in violation of RICO 18 U.S.C., Section 1962(d). See Amed-Com. Par. 450 and Index #13 . (same as 2 above)

Mayes has alleged other acts of deliberate fraudulent concealment, as in his Cause of Action 19, Mayes has alleged that James Tommaney, (hereafter Tommaney) as a member of the Board of Trustees of the Local 106 Union Training and Apprenticeship Fund, a Trust Fund set up under ERISA, refused to answer Mayes' certified mail request, as Mayes was a contributor and beneficiary of said Fund, for information about the Training Fund's filing of its Form 990 Reports under Federal Employer 1.D. #22-2549231, where the IRS reported none had been filed. Tommaney, had superior knowledge that even though Employer 1. D. #22-2549231, was at various times used to file Form 990 Reports, that a new and different Employer 1. D. Number had been used for the years Mayes made inquiry of. See Amed-Comp. Par. 459 -476 and

Index # 14 . See also Mayes letter 12/05/90 and **Index # 15** .

Mayes has alleged other acts of deliberate fraudulent concealment, as in his Cause of Action 20, Mayes has alleged that Gordon Kilby, (hereafter Kilby) as a member of the Board of Trustees of the Local 106 Union Training and Apprenticeship Fund, a Trust Fund set up under ERISA, refused to answer Mayes' certified mail request, as a contributor and beneficiary of said Fund, for information about the Training Fund's filing of its Form 990 Reports under Federal Employer I.D. #22-2549231, where the IRS reported none had been filed. Kilby, had superior knowledge that even though Employer I.D. #22-2549231, was at various times used to file Form 990 Reports, that a new and different Employer I.D. Number had been used for the years Mayes made inquiry of. See Amed-Comp. Par. 480-507 and **Index # 16** . See also Mayes letter 12/06/90 and **Index # 17**.

Mayes has alleged other acts of deliberate fraudulent concealment, in his Cause of Action 21, Mayes has alleged that Eugene Hallock (hereafter Hallock) as a member of the Board of Trustees of the Local 106 Union Training and Apprenticeship Fund, a Trust Fund set up under ERISA, refused to answer Mayes' certified mail request, as a contributor and beneficiary of said Fund, for information about the Training Fund's filing of its Form 990 Reports under Federal Employer I.D. #22-2549231, where the IRS reported none had been filed. Hallock, had superior knowledge that even though Employer I.D. #22-2549231, was at various times used to file Form 990 Reports, that a new and different Employer I.D. Number had been used for the years Mayes made inquiry of. See Amed-Comp. Par. 509 -535 and **Index $ 18.** See also Mayes letter 12/06/90 and **Index # 19.** Mayes asks the Court to note that Par. 535 contains a typographical error, i.e. "Fifteenth" should read "Twenty-first"

POINT III

TOLLING OF THE STATUTE OF LIMITATIONS UNDER SECOND CIRCUIT DOCTRINE OF CONTINUING VIOLATIONS

Mayes submits that it is well settled law in the Second Circuit that where a violation is ongoing and continuing, such acts will toll the relevant statute of limitations. The Second Circuit in Acha v,Beame , 570 F.2d 57, (2d Cir. 1977) noted that; "A continuously maintained employment policy may be the subject of a valid complaint until a specified number of days after the last occurrence of an instance of that policy. Wetzel v. Liberty Mutual Insurance Co, , 508 F.2d 239,246 (3d Cir., cert. denied, 421 U.S. 1011, 44 L.Ed.2d 679, 95 S.Ct. 2415 (1975); Macklin v. Spector Frieght Systems Inc. , 156 U.S. App.D.C.69, 478 F.2d 979,986-90 (1973). See also 118 Cong. Rec. 7565 (March 6,1972). Furthermore, where an illegal policy is so maintained, relief for injuries sustained even before the beginning of the limitations period is appropriate. "

The Second Circuit in a more recent case cited the "continuing violation" doctrine in Adamantia Pollis Plaint v. The New School For Social Reseaech , . 536 F.*****(19**); "The continuing violation doctrine allows a plaintiff in certain circumstances to recover on the basis of an ongoing policy or practice of an illegal activity initiated prior to the limitations period. See Hanover Shoe. Inc. V. United Shoe Mach. Corp. , 392 U.S. 481, 502 n.15, 88 S.Ct. 2224, 2236 n.15 (1968)."

Mayes' verified Amended Complaint is replete with allegations or claims that the named Appellees have continuously violated the Labor Management Reporting And Disclosure Act of 1947, as amended, 29 U.S.C. Sec. 501(c), beginning with Cause Of Action 2. These same types of acts, although sometimes by other or new persons, did continue as Mayes has alleged in Cause Of

Action 2 through 12. See Amed-Comp. Par 42 [page 21], and continued through Cause of Action 12. See Amed-Comp. Par. 383 [page 340] and **Index # 20.** There are also examples of Mayes' allegations of Sec. 501(c) violations in his Cause of Action 22, 25, 26, 27, 28, 30 & 31.

POINT IV

PLAINTIFF-APPELLANT MAYES' RIGHTS TO ASSERT SEC. 501 (c) CLAIMS

The Court's MDO of 2/05/99 apparently crafted in a manner to avoid ruling on each and every one of Mayes' Section 501(c) allegations or claims by ruling that; "Section 501(c), entitled "Embezzlement of assets: penalty," permits criminal proceedings against officers of labor organizations who embezzle funds from such entities, but does not provide a private action for a plaintiff in a civil suit. (n.6)." If Mayes has inartfully and therefore not properly stated the correct relevant Sections of Federal Law, the Court should make allowances for Mayes' ineptitude as a pro se litigant, as provided for by the United States Supreme Court in Haines .

Mayes submits a belief that his citing the continuing violations of Section 501 (c) are correct, just as the Court has illustrated in its foot note "6", a violation of Section 501 (c) is a crime punishable by a fine or imprisonment up to five years. Mayes has alleged or claimed a right under Civil RICO 18 U.S. Sec 1964 (c), which requires that a violation or conspiracy to commit a RICO violation under 18 U.S.C. Section 1962 (c) must have occurred, and as Mayes has properly identified in his Amed-Comp. and documented by exhibits attached to his various affidavits. For example, see Mayes' Aff. 1/30/97 p.4-7, Exhibits B,C,D,E,F,G,H,1 and **Index # 21**.

Mayes submits that the Court's MDO of 2/05/99 did consider an error in his pro se pleading so as to rule on Mayes' claim under the LMRDA Section 501(b), but then also, to summarily dismiss it on the grounds of a finding that; "Plaintiff has not followed this mandate: he simply raises Section 501(b) allegations in his complaint, which is not procedurally permissible under the statute. His LMRDA claims must be dismissed." See MDO 2/05/99 p.20-22 and **Index # 22.** .

One part of the Court's summary dismissal of all of Mayes alleged Section 501 (c) claims appears to be for failure to meet the requirement of exhaustion of internal union remedies, even though no case citations were given. Mayes has admitted that he did not request the officers of Local 106 Union to file suit against them selves to stop the claimed embezzlement of union funds, where the very same union officials that such an appeal or notification was addressed to, would be the same officers that are among the named Appellant-Defendants in this litigation. See Amed-Com. P. 43 and **Index # 23**. [page 22 & 23]

The Fifth Circuit Court in Calaqaz v. Calhoon , 309 F.2d 248 (5th 1962), noted that; "Defendants contend that the complaint should be dismissed, because the plaintiff did not exhaust his internal remedies within the union. The plaintiff, however, alleged in his complaint that action to obtain relief through union procedures would be "futile" because the individuals who were named as defendants and whose actions the plaintiff complains of, are officers of National and are in control of all channels of relief the plaintiff might have in the union. See Finger v. Seaboard Air Line railroad Co, , 5th Cir. 1960, 277 F.2d 698, 701. The plaintiffs are not compelled to exhaust the internal remedies of their union when their appeal would have to be made to the very same officers against whom their complaint is directed. Steele v.

Louisville & Nashville Railroad Co. , 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed.2d 173." Mayes submits that he did rely in good faith, upon the United States Supreme Court's decision in Steele when he filed his Complaint and his Amended Complaint.

The apparent second requirement under Section 501 (b) that the Court used to summarily dismiss the Section 501 (c) claims, was his failure to obtain leave of the court. Mayes submits that he believed that where he could establish and meet the "good cause shown requirement ", the Court would exercise its discretion to allow his litigation to proceed. The Court's MDO of 2/05/99 cited no case precedents for its dismissal of all of Mayes' Section 501(c) allegations or claims under this premise. See MDO 2/05/99 P.19,20, & 21 and **Index # 24**.

The Third Circuit in Sabolsky v. Budzanoski ,. 457 F. 2d 1245, noted; "It has been held that a lack of formality in observing the procedures of Section 501 (b) will not bar a court from granting leave, where appropriate. Executive Board, Local Union No. 28 v. I.B.E.W. , As the court said in Hornor v. Ferron , n 26. 362 F.2d 224(9th Cir 1966) "the allegations of the verified complaint may be sufficient to enable the court to determine where there is 'good cause.'" The Court in Sabolsky also noted; "We held in Purcel v. Keene , 406 F.2d 1195 (1969) that there is no mandatory exhaustion of internal remedies requirement in suits brought under Section 501 of the LMRDA. We also stated that efforts to evoke internal remedies of the union may affect the "good cause" requirement of Section 501 (b) under certain circumstances. "

The Seventh Circuit in McNamara v. Johnston , 522 F.2d 1157 (1975) noted; "We have recognized the similarity between a Sec. 501 action and a shareholder's derivative suit and have noted that, as in the case of a derivative suit, a demand is not always necessary. Hood v. Journeymen Barbers, Hairdressers, Etc. . 454

F. 2d 1347, 1354, n.23 (7th Cir.1972)."

The Fifth Circuit Court in Adams-Lundy v. Association of Professional Flight Attendants , 844 f.2D 245 (1988) noted that; "We agree with the Second Circuit that in determining whether a request for legal action was made, we must keep in mind that "the Act is designed to protect union members" and that an interpretation of Section 501 (b) requires a balancing of policies. n.24"

The Second Circuit in a more recent case has again stated its position of 29 U.S.C.Section 501(b) in Dunlop-McCullen v. Local IS , 149 F. 3d 85 (2d Cir.1998) where it noted; "This Court has found that the "good cause" required for leave to sue under Section 501(b) serves two policies: "[1] supervision of union officials in the exercise of their fiduciary obligations and [2] protection, through a preliminary screening mechanism, of the internal operation of unions against unjustified interference or harassment." Dinko v. Wall , 531 F.2d 68,75 (2d Cir .1976). Accordingly, we have construed "good cause" in Section 501(b) "to mean that plaintiff must show a reasonable likelihood of success and, with regard to any material fact he alleges, must have reasonable ground for belief in their existence. Id." Mayes submits a belief that his verified Amended Complaint and Affidavit of May 14, 1998, with attached exhibits, fully meets said "good cause" requirement and also meets the Supreme Court's holding in Steele .

However, in the alternative, if the court must look outside the Amended complaint, then Mayes asks this Court to consider his communications with Local 106 Union officials, officials of the Engineers Joint Pension Fund in Syracuse and officials of the Central Pension Fund in Washington, D.C., in early 1993 before filing this litigation. These are inquiries to: Mr. Frank Gould, Central Pension Fund Administrator; Attorney Michael Crabtree, Central Pension Fund Counsel; Mr. Robert Van Dyke, Fund

Administrator for the Engineers Joint Pension Fund; Mr. John Kellogg, Business Manager Local 106 Union; Mr. Frank Lomio, Coordinator for the Local 106 Training and Apprenticeship Fund; Attorney Thomas Jordan, Counsel for Local 106 Union; each member of the Board of Trustees of the Engineers Joint Pension Fund; Attorney Charles Blitmen, Counsel for the Engineers Joint Pension Fund, Engineers Joint Benefit Funds. The main inquiry of these letters are the unauthorized overpayments of per hour pension contribution and/or extra overtime hours, being reported and paid into the personal pension fund account or accounts as the case may be, by Local 106 Union officials, which is the crux of this litigation. Mayes submits paragraphs 23 through 41 with the attached reference exhibits numbers 14 through 28a, of his May 14, 1998 Affidavit. See Mayes Aff. 5/14/98 and **Index # 25**.

POINT V

CRIMES UNDER THE RACKETEERING IN CORRUPT ORGANIZATIONS ACT U.S.C. Sec. 1961. et seq. ARE ACTIONABLE CIVIL RICO Sec .1962, et seq.

Mayes, by his verified Amended Complaint has fairly plead with the requisite particularity as required by Federal Rules of Civil Procedure- Rule 9(b) as the Court's MDO of 2/05/99 did not find otherwise. The allegations setting forth the numerous violations of the Labor-Management Reporting Disclosure Act of 1947, as amended 29 U.S.C. Sec. 501(c), were actually done as criminal acts and therefore each such alleged violation act as such comes under the 18 U.S.C. Section 1961 (1), 1961 (4) therefore are also acts in violation of 18 U.S.C. Section(s) 1964.

Among Appellee-LaBarge's first acts in violation of 18 U.S.C. 1961(1) was when under his power and authority of his union office

as Local 106 Business Manager, he caused the compiling and preparing of the Contractor's monthly Pension Report Form, (hereafter Report Form) for the payroll period beginning December 24, 1980, said Report Form contained false information in a record required to be prepared and kept under the Employees Retirement Income Security Act (ERISA) 18 U.S.C. Section 1027, as duly alleged in Mayes' Cause of Action 2. See Amed-Comp. Par. 25, 26 & 27 and **Index # 26.** .

Another violation was caused by LaBarge where under the power and authority of his Union office as Business Manager, he caused the Local 106 Union Office Manager, Jane M. LaBarge (LaBarge's wife -now deceased) to help compile, prepare or so direct others to prepare the pension Report Form for the said payroll period beginning on December 24, 1980, which contained false information.

Another violation was caused by LaBarge where under the power and authority of his Union office as Business Manager, he caused the Local 106 Union Office clerk, Apellee-Diane 0' Hare, to help compile, prepare or so assist others to prepare the pension Report Form for the said payroll period beginning on December 24, 1980, which contained false information.

Another violation was caused by LaBarge where under the power and authority of his Union office as Business Manager, he caused the Local 106 Union President, Lester E. Jones (now deceased) to sign and thereby validate a check drawn upon the Local 106 Union Treasury, for payment of the unauthorized sums of money that was compiled and reported in the pension Report Forms for said payroll period beginning on December 24, 1980, which contained false information.

Another violation was caused by LaBarge where under the power and authority of his Union office as Business Manager, he

caused the Local 106 Union Treasurer, Appellee-Richard C. Kositzka to sign and thereby validate a check drawn upon the Local 106 Union Treasury, for payment of the unauthorized sums of money that was compiled and reported in the pension Report Forms for said payroll period beginning on December 24, 1980, which contained false information.

Another violation was caused by LaBarge where under the power and authority of his Union office as Business Manager, he caused the check drawn upon the 106 Union Treasury, for payment of unauthorized sums of money that was compiled and reported in the pension Report Forms for said payroll period beginning on December 24, 1980, which contained false information, to be deposited in the United States Postal Service in violation of ERISA Section 1104, 1132 and therefore constitutes a violation of 18 U.S.C. Section 1341. See Amed-Comp Par. 25, 26 and **Index # 27.**

Mayes has alleged that each act stated above were acts in furtherance of a RICO conspiracy under 18 U.S.C. Section 1962(b), 1962(d). Mayes has also alleged that each identified act stated above were also acts by the named defendants, that constituted criminal acts of aiding and abetting, because the false Report Forms and accompanying check, contained amounts of unauthorized money, taken from the Union Treasury to be forwarded through the Postal Service for distribution into each named Appellee's personal pension fund account or accounts, as the case may be. Therefore, each living participant, LaBarge, 0' Hare, K Hositzka, and others, had a personal interest in seeing these acts done, therefore as aider and abettors, they are as liable in these crimes as is the principal. The United States Supreme Court noted in Nye & Nissen v. United States , 336 U.S. 613, 69 S.Ct.766, 93 L.Ed. 919 (1949) did note; "In order to aid and abet another to

commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." L .Hand, J., in United States v. Peoni , 100 F.2d 401, 402. (2d Cir.1938).

The Seventh Circuit in McNamara v. Johnson , 522 F.2d 1157 (1975) noted; "We have previously recognized that Congress drew upon the Restatement of Agency when it codified the common law of fiduciary obligations in Section 501. Hood v. Journeymen Barbers, Hairdressers, Etc , supra, 454 F.2d at 1355. Under that authority it is well established that an agent cannot be insulated from criminal liability by fact that his principal authorized his conduct." LaBarge by his affidavit of 9/30/96 admitted he had uni laterally authorized the additional amounts of pension contributions, without approval of the Executive Board or membership and therefore all the aiders and/or abettors who compiled and prepared the Report Forms and caused them to be sent through the United States postal Service, in violation of 18 U.S.C Section 1341, are each equally guilty as is LaBarge.

The Supreme Court also noted in Nye & Nissen that; "It makes a defendant a principal when he consciously shares in a criminal act whether or not there is a conspiracy. And if a conspiracy is also charged, it makes no difference so far as aiding and abetting is concerned whether the substantive offense is done pursuant to the conspiracy. Pinkerton v. United States , is narrow in its scope. Aiding and abetting rests on a broader base; it states a rule of criminal responsibility for acts which one assists another in performing. The fact that a particular case might conceivably be submitted to the jury on either theory is irrelevant. It is sufficient if the proof adduced and the basis on which it was submitted were sufficient to support the verdict." Mayes submits that the

evidence already before the Court is sufficient to support fully his allegations or claims, even if only his verified Amended Complaint is considered, without any discovery.

Additionally, Mayes has alleged that LaBarge and the LaBarge Group as conspirators have therefore also committed these alleged acts in violation of Section 18 U.S.C. Section 1964(d) and therefore these same acts are additionally predicate acts under a civil RICO conspiracy.

Mayes has alleged that LaBarge, in causing the increase of thirty ($.30) per hour increase in Central Pension Fund contributions, to be compiled, reported and paid by a check drawn upon the Local 106 Union treasury, beginning with the pay roll period of December 24, 1980, for his own personal benefit, was done with the wilful intent to embezzle funds from the Union treasury. This wilful intent is fully illustrated by the records already before the Court. LaBarge, in his Affidavit of July 28, 1993, fully admitted that such expenditures must be submitted to the Local 106 Union Executive Board and approved by them. He sets forth as his attached Exhibit "A" the relevant Articles of the International Constitution and Local 106 by-laws, thereby documenting his full knowledge that such expenditures must be approved by the Local 106 Executive Board and if approved, must be submited to the Union Membership at its next subsequent meeting, to be ratified or rejected by the membership. See LaBarge Aff. 7/28/93 " and **Index # 28** . [entire AFF]

LaBarge also fully admitted that he unilaterally decided to increase the per hour rate of pension contribution to the Central Pension Fund in Washington, D.C., which included himself. (see LaBarge Aff.7/28/93 par."6"). He also admits that he unilaterally decided to increase the pension fund contribution from the standard 40 hours per week, to 46 hours per week. (see LaBarge Aff.

7/28/93 par. "6") Mayes has proven that these unauthorized extra overtime hours were documented on the Report Form that began with the payroll period of May 27, 1981 to June 9, 1981. These unauthorized extra hours of pension fund payments into the Engineers Joint Pension Fund was for LaBarge also. See Amęd-Comp par. 45 and **Index # 29.** .

LaBarge also claimed that he decided to increase by $.25 per hour the amount of pension fund contributions to the Central Pension Fund in Washington, D.C. and claimed he submitted this increase to the Local 106 Union Executive Board at its October 13, 1983 meeting, (please note the proper date is "October 10, 1983") He submits as his Exhibit "C" a copy of said Executive Board meeting minutes, (see LaBarge Aff. 7/28/93 par. "6" & Exhibit "C") The relevant paragraph of the meeting is; " Business Manager LaBarge advised the Board that no paid employees of the Union would receive an increment in salary as they normally do at this time of the year. He further advised the Board that a $.25 [cent] per hour contribution will be made into the Central Pension Fund for each employee. Normally the staff would receive a 7 percent raise just as do the members under the terms of the A.G.C. contract. A motion was made by Bill Maxwell in favor of the increase in the pension contribution. Motion was seconded by Jim Leonard. Motion Carried." See LaBarge AFF. 7/28/93; & Exhibit "C" and **Index # 30**.

The Second Circuit in United States v. Butler , 954 F.2d 114, (1992) heard a case where a union official who apparently had conned the Union's Executive Board into paying for additional expenses where the fact that Trustees were already being fully compensated, had been concealed by said official. The Court noted; "An authorization obtained without disclosure of such material information is obviously a nullity. See United States V.

Lavergne , 805 F.2d 517, 523 (5th Cir. 1986)."

Mayes, has documented the relevant facts that LaBarge concealed the $.30 per hour increase of pension fund rate of contributions to the Central Pension Fund that began with the pay period of 12/24/1980, as he admitted doing it but never submitted it to the Local 106 Union executive Board for its approval, or of the extra hours reported and paid into the Engineers Joint Pension Fund that began with the pay period of May 27, 1981. See Mayes Aff. 5/14/98 Par. 46 & exhibit 30 and **Index # 31**.

LaBarge also concealed from the Local 106 Union Executive Board the fact that he had unilaterally gave himself and the Union staff a 10 percent raise on September 22, 1981. This is documented in the
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LaBarge also concealed from the Local 106 Union Executive Board the fact that he had unilaterally gave himself and the Union staff a 10 percent raise on September 22, 1981. This is documented in the Executive Board minutes of January 5, 1982, more than three months later. The record proves also that the Local 106 Executive Board took no action to approve of it, therefore it was not submitted to the Union membership for approval as required by the Union Constitution-ByLaws. Therefore, Mayes claims that even the one single and only documented act by LaBarge to seek approval of the increase of $.25 per hour rate of pension payment to the Central Pension Fund, was made null and void by the 5th Circuit decision in Lavergne. See Mayes Aff. 5/14/98, Par. 14-15, exhibit 5, and **Index # 32.**

Mayes has alleged that said acts of compiling, reporting and

paying for these "extra hours" first only into the Engineers Joint Pension fund but later, also into the Central Pension fund, where no record of any written agreement between Local 106 Union and its staff employees, including LaBarge, that establishes a "basic rate" per hour for employees on a weekly salary that worked over 40 hours, as required by the Fair Labor Standards Act of 1938, 29 U.S. C. Sections 201-218(1988). See Amed-Comp Par. 43 and **Index # 33**.

The Eleventh Circuit Court in Combs v. King , **** (1985) noted that; "No court has expressly held that an employer has a duty to maintain records under section 1059. However, in Central States, Southeast and Southwest Area Pension Fund v. Central Transport, Inc. , 698 F.2d 802 (6th Cir.1983), the court observed that section 1059 imposed "a duty of responsibility and record keeping on employers who are participants in an employee benefit plan." Id. at 805. In Korn v. Levine Bros. Iron Works Corp. , 574 F. Supp. 836 (S.D.N.Y. 1983) the district court made a similar observation when it discussed the failure of an employer and several trustees to offer into evidence the company's original payroll and other relevant records. The court stated:" . . . After some hesitation on defendants part, they did initially produce in court with the company's original payroll and other records -- two sets in fact. Perplexingly, neither was offered into evidence. This is despite the legal requirement mandating the maintenance of such records. See 29 U.S.C. section[s] 1027 & 1059(1959); 29 C.F.R. 486.1-486.5(1983)." The court in Combs also noted; "We must determine the nature of the records which are required to be maintained. . . .29 U.S.C. Section 1027. This section has recently been construed by the Sixth Circuit in United States v. S & Vee Cartage Co. , 704 F.2d 914(6th Cir.1983) cert denied, 464 U.S. 935, 104 S.Ct. 343, 78 L.Ed.2d 310(1983). "In S & Vee Cartage

the court held that certain forms which an employer used to report the amount of contributions due and changes in the status of employees were "required 'to be kept'" under section 1027 because they contained "the necessary information and data from which annual reports, required under 29 U.S.C. sections 1023(a)(2) and 1024(a) (1976) to be published and sent by the administrator of a fund to the Secretary of Labor, "may be verified, explained, or clarified and checked for accuracy and completeness. . . .'" Id. at 917." Mayes has alleged in the numerous instances, the Appellee-Defendants failed to produce the pension Report Forms or had at one time in 1985, deliberately destroyed them. See Mayes AFF. 5/14/98 Par. 47 and **Index # 34**.

The court in Combs also noted; ". . . we must determine whether the burden of proof in cases brought under the FLSA is appropriate in cases brought under ERISA. This too is a question of first impression in this Circuit. We are guided by the Supreme Court's discussion in Anderson v. Mt. Clemens Pottery Co. . In Anderson , the Court considered the remedial nature of the FLSA, the great public policy which it embodied, and the fact that a stringent burden of proof upon employees would have the practical effect of impairing many of the statutes benefits. Of considerable importance was the employer's duty to maintain proper records. The Court observed: "Due regard must be given to the fact that it is the employer who has the duty under Section ll(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and produce the most probative facts concerning the nature and amount of work performed. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying his burden of proof." Anderson . It is submitted that these court decisions support Mayes' allegations. The Court in Combs also observed;

"The court finds the cases dealing with the Fair Labor Standards Act distinguishable because of the statutory duty placed on The court in Combs also noted; "We must determine the nature of the records which are required to be maintained. . . .29 U.S.C. Section 1027. This section has recently been construed by the Sixth Circuit in United States v. S & Vee Cartage Co. , 704 F.2d 914(6th Cir.1983) cert denied, 464 U.S. 935, 104 S.Ct. 343, 78 L.Ed.2d 310(1983). "In S & Vee Cartage the court held that certain forms which an employer used to report the amount of contributions due and changes in the status of employees were "required 'to be kept'" under section 1027 because they contained "the necessary information and data from which annual reports, required under 29 U.S.C. sections 1023(a)(2) and 1024(a) (1976) to be published and sent by the administrator of a fund to the Secretary of Labor, "may be verified, explained, or clarified and checked for accuracy and completeness. . . .'" Id. at 917." Mayes has alleged in the numerous instances, the Appellee-Defendants failed to produce the pension Report Forms or had at one time in 1985, deliberately destroyed them. See Mayes AFF. 5/14/98 Par. 47 and **Index # 34**.

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Mayes submits that each such documented violation of Section 411 that began in 1981 and did continue through the date this litigation began, June 3, 1993, was an ongoing and continuing violation. Therefore, under the Second Circuit doctrine of Acha v. Beame , 570 F.2d 57,65 (2d Cir. 1978, and was also stated in Pollis v. New School For Social Research , 132 F.3d 115, Ed. Law. Rep. 1123 (2d Cir. 1997, is applicable to his claims under Section 411. The Court's finding that Mayes' Memordum of Law at page 50, admits that his Section 411 (a) (1) LMRDA claims in causes of action, two through twenty-one are time barred, is correct only in relation to reversible error on the part of Mayes' Attorney. That record does state only that under the LMRDA, the applicable statute of limitations would be three years. However, the well settled doctrine of "continuing violations" should have been considered by the Court, based on the record before the Court and Mayes' verified Amended Complaint. The finding that Mayes' causes of action are time-barred must be clearly erroneous. See MDO pages 21-22 **Index # 39**. See also Mayes' MOL 1/30/97, p. 50-51 and **Index # 40** .

Mayes did properly identify the requisite Section 411 violations that had occurred during a appropriate three year period prior to June 3, 1993, but the Court ruled he had failed to state a claim. Mayes submits that a fair reading of his verified Amended Complaint, even if "inartfully drawn", does in fact state a claim, and therefore the finding by the Court is clearly erroneous.

POINT VI

INJURY TO MAYES' BUSINESS AND PROPERTY UNIQUE TO HIM

Mayes claims that he became the target of a personal vendetta by LaBarge and the LaBarge Group of conspirators, co-conspiritors and aiders and/or abettors, when he was appointed as Business Agent for Local 106 Union and then assigned him the Union territory that LaBarge had been fired from. This was first evidenced by LaBarge when he caused to be circulated among the Local 106 Union members a vicious rumor that because Mayes had accepted the job that he (laBarge) had been fired from, Mayes would never work in Local 106 Union's jurisdiction again. This was stated to Mayes personally by a member who had attended a LaBarge faction get-together where it had been said.

It had been tradition for as many years as Mayes has been a Union member, for the B.A.'s to make a report of the jobs visited, any problems solved or other activities concerning Union work in that B.A.'s assigned territory. LaBarge and his followers were able to actually control the Union meetings by their inference of reprisal towards anyone who opposed them. By this control, the LaBarge faction passed resolutions denying Mayes, as B.A., from giving his monthly report at the June, July & August, 1980 membership meeting. See meeting minutes 7/20/80 and **Index # 41**.

Mayes appeared before the Local 106 Union Executive

Board on June 10, 1980 by invitation of the then Union president. At that time Mayes submitted a resolution to amend the Local 106 ByLaws for the purpose of causing a more fair and equal distribution of the job opportunities from the Local 106 Union Hall.

Mayes, at the very beginning of his appearance, handed out copies of the proposed resolution to the Executive Board members present. As Mayes began reading the proposed Resolution, he heard several loud coughs from LaBarge. Mayes was standing to make his presentation so he could see LaBarge and also President Jones. Jones was engrossed in reading the proposed Resolution and at first didn't respond to LaBarge's coughing. As Mayes watched, Jones suddenly looked at LaBarge, who must have somehow signaled that he wanted Mayes to be cut off. This was promptly done by President Jones, who said that this was not on the Board's Agenda for that date therefore I would have to come back at a later date. I thanked the Board and left. The Executive Board minutes document Mayes' appearance and actions. See Ex-Bd minutes 6/10/80 and **Index # 42**.

There was no proper meeting of said Board in July 7, 1980, and therefore the agenda for July was acted upon at the August 12, 1980 Board meeting. It is documented that, Mayes' Resolution to amend the By-Laws, was tabled by a vote by LaBarge's son-in-law Kositzka and LaBarge himself. See Ex-Bd Min. 8/14/80 and **Index # 43**.

The minutes of the regular membership meeting of July 20, 1980 discloses that Br. Tuttle made a motion to dispense with the BA's reports except the Bus-mgr's report. "Business Manager wanted to know why we haven't heard their reports for 3 meetings mow. ... On a voice vote the BA'S reports were not read." See minutes and **Index # 44**.

Due to the fact that Mayes had properly appeared before the

Local 106 Union Executive Board on June 10, 1980 and had served each Board member present a copy of his proposed amendment to the Local 106 Union ByLaws, as required by the Constitution-ByLaws of Local 106, Business Manager notified the entire Union membership by mail of a specially called membership meeting for Sunday July 15, 1980. On the agenda was scheduled vote on Mayes' Resolution. On the appointed day LaBarge and his wife Jane M. LaBarge assembled their supporters at the back parking lot of the 1044 Broadway meeting hall and just prior to meeting time filed them into the meeting hall and over filled the seats so that the isles were full of standing LaBarge supporters who could look down at those members who were seated and see how they voted when a show of hands was called for to vote on Mayes' Resolution. After Mayes read his Resolution into the meeting record, Jane M. LaBarge gained the podium to speak on the Resolution. After a scathing attack on Mayes, evidencing her hostility against Mayes, she improperly posed a motion to table Mayes' Resolution. Jane LaBarge's Brother in-law, President Lester E. Jones improperly allowed a vote on her motion and Mayes' Resolution was killed by her motion to table. Due to the radical turmoil created by the LaBarge Group, there are no official minutes of this special meeting. Mayes submits a copy of said notice and his Resolution. See **Index # 45**.

The personal Vendetta of LaBarge is further evidenced by the firing of Mayes by LaBarge on the day he took office in September 1980. At the same time he hired his wife, Jane M. LaBarge as the Local 106 Union Office Manager and Dispatcher, thereby solidified the absolute control of all job referrals from Local 106 Union office. Because of this control and the personal vendetta of the LaBarge's, Mayes did not work a single day for the next six months. Other members who were classified as LaBarge

opposition, did work although not much, it was only Mayes who was to be made an example of by no jobs. Mayes ran out of unemployment benefit and Union Welfare benefits. He went to the Union office and personally informed LaBarge of the situation, but LaBarge did nothing to put Mayes to work. In the 12 month period of time from September of 1980, when he was fired as BA by LaBarge to September 1981, Mayes only worked a total of 275 hours, where typically he had worked 2.000 or more hours.. This same type of treatment continued when Mayes returned from working out of state in April 1983, where he had been forced to go to financially survive the LaBarge vendetta. He returned mainly for the purpose of running against LaBarge for the office of Local 106 Business Manager. See Mayes campaign letter 5/13/1983 and **Index # 46**.

Mayes has alleged that the named Appellee-Defendants have controlled Local 106 Union as an RICO "enterprise" therefore by such control the actual embezzling and common law stealing of the sums of money they were able to channel into their individual pension account or accounts as the case may be, did in fact harm Local 106 Union directly. This has been set forth by Mayes in his affidavit of 9/30/96, Par. 5 and **Index # 47**.

POINT VII
INJURY SUSTAINED BY MAYES WAS "INDIRECT" THEREFORE ACTIONABLE

The Seventh Circuit in Carter v. Berger , 777 F.2d 1173 noted; "The [Supreme] Court anticipated a similar possibility in Illinois Brick, . It said that an indirect purchaser may sue "where the direct purchaser is owned or controlled by" the wrongdoer. 431 U.S. at 736 n.16. See Midwest Milk Monopolization Litigation

730 F.2d 528(8th Cir. 1984) .-Arizona v. Shamrock Foods Co.. 729 1208(9th Cir. 1984). Doubtless indirectly injured parties could recover under RICO when they show that the directly injured party was under the continuing control or influence of the defendant or his henchmen. "

The Apellee-Defendants have claimed; "The bulk of Plaintiff's [Mayes'] causes of action are based on alleged overpayment into certain benefit funds. Causes of action 2 through 12 deal with the listings of these benefits. Causes of action 14, 16, 17, 18, 19, 20, 21, 22, 23, and 24 deal with reports concering these benefits or alleged failures to respond to Plaintiff's concerning the benefit payments. All of these matters effect the Union as an entity, not the Plaintiff as a union member. It is the Union itself which is the real party of interest, not Mr. Mayes, and, as such, it is the union alone, not Mr. Mayes which has standing to assert its rights." (please note the numbers of causes are those in the original complaint of 1993) See Rule 10-J Statement 1993, p. 10 and **Index # 48.** .

The Court in its MDO 2/05/99 at page II stated; "Plaintiff submits these "Predicate Acts" caused harm to his union membership, which he repeatedly asserts "is [a] property to be protected as much as a valuable chattel." See, e.g.. Amend. Comp. at [par.] 26. His assertion misses the point, however, if true, these specific predicate acts he alleges did not injure him alone, but injured Local 106 as a whole. Although the union might have standing to raise these claims, plaintiff does not." The finding by the Court that the alleged specific predicate claims, "if true" are injuries to the Local 106 [Union] as a whole, is also the claim set forth by the Appellee-Defendants. As such, can also be claimed in arguendo by Mayes, and therefore Mayes would be properly classified as an "indirectly injured" party as a Union member,

therefore as the Supreme Court and Seventh Circuit Court, have cited above, have held; " a party who can prove an indirect injury can also have a case for damages where the real injured party was under the continuing control of the defendant or his henchmen.", which Mayes has properly alleged. See MDO 2/05/99 p. 11 and **Index # 49**.

Mayes submits a good faith belief that he has properly alleged or plead the requisite information to at least establish a material fact question as to the named Appellees control of Local 106 Union as a RICO "enterprise". Thereby, also establishing a material fact question as to his ability to claim a harm to his business or property, as an "indirect injury" by the many acts as are set forth in his Amended Complaint

POINT VIII
SUMMARY JUDGEMENT IS INAPPROPRIATE WHERE QUESTIONS OF "INTENT" AND "STATE OF MIND" ARE PRESENT

The Second Circuit has consistently held where it is alleged or claimed, that a defendant's state of mind is in question, the granting of summary judgement in defendant's favor is inappropriate. The Second Circuit in Patrick v. Lefevre , 745 F.2d 153, (1984) noted; "Although we might not have any quarrel with this conclusion had it been reached after a trial, we do hold that it was improper to grant the summary judgement motion, where resolution of the dispositive issues squarely implicated the claimants state of Mind." The Court also stated; " On motion for summary judgement, we are mindful of the maxim that "the court cannot try issues of fact; it can only determine whether there are issues to be tried." Heyman v. Commerce and Industry co. , 524 F.2d 1317, 1319-20 (2d Cir.

1975). Moreover, the court must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgement is sought, see Heyman v. Commerce and Industry Co. , supra, 524 F.2d at 1320, with the burden on the moving party to demonstrate the absence of any material issue genuinely in disputes, see Adicks v. H.S, Kress & Co. 398 U.S. 144, 157, 26 L.Ed. 2d 142, 90 S.Ct.1598 (1970). Requiring the movant to overcome this stringent presumption and meet this burden of proof is clearly appropriate, given the drastic effect of granting summary judgement -- the litigant is precluded from presenting his case to the jury. See Poller v. Columbia Broadcasting System, Inc. , 368 U.S. 464, 473, 7 L.Ed.2d 458, 82 S. Ct. 486(1962); American International Group Inc. v. London American International Corp. Ltd. , 664 F.2d 348,351 (2d Cir. 1981); Donnelly v. Guin , 467 F.2d 290, 291 (2d Cir. 1972)."

The Second Circuit in that same case stated; "This Court has consistently held where subjective issues regarding a litigant's state of mind, motive, sincerity or conscience are squarely implicated, summary judgement would appear to be inappropriate and a trial indispensable, see Schering Corp v. Home Insurance Co. , 712 F.2d 4, 10 (2d Cir. 1983); Landmark land Co.Inc. V. Spraque , 701 F.2d 1065, 1070 2d Cir.(1983); American International Group, Inc. V. London American International Co.Lyd. , supra, 664 F2d at 353 (2d Cir, 1981; Quinn v. Syracuse Model Neighborhood Corp. , 613 F.2d 438, 444 (2d Cir, 1980); Empire Electronics Co. Inc v. United States. , 311 F2d 175, 180(2d Cir.1962); Amstein v. Porter , 154 F.2d 464, 4719 (2d Cir. 1946). The need for a full exposition of facts is profound under such circumstances since determining a man's state of mind is "an awesome problem," capable of resolution only by reference to a panoply of subjective factors. See Sittler v. United States , 316 F.2d 312, 315 (2d Cir, 1963) (Kaufman, J.

concurring). Furthermore, a sojourn into an adherent's mind-set will inevitably trigger myriad factual inferences, as to which reasonable persons might differ in their resolution. Traditionally, this function has been entrusted to the jury."

The Second Circuit in Leberman v. John Blair , 880 F.2d 1555 (2d Cir. 1989) also noted; "Summary judgement is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles." Pfizer. Inc. v. Int'l Rectifier Corp. ,. 538 F.2d 180, 185 (8th Cor. 1976), cert. denied, 429 U.S. 1040, 50 L.Ed. 2d 752, 97 S.Ct. 738(1977). Therefore, the issue of good faith presents an additional triable issue, making summary judgement improper." Mayes claims that the only Affidavits by the named 12 Appellee - Defendants entered in their defense were two by LaBarge 7/28/93 & 9/30/96 and Appellee-Defendant Gene Messercola (hereafter Messercola) 3/24/98. Messercola's Affidavit fails to claim any Section 501 (c) defense. See Messercola Affidavit 3/24/98 and **Index # 50** ,

The two affidavits by LaBarge, 7/28/93 & 9/30/96 also raise no Section 501 (c) specific defense. LaBarge in his 7/28/93 Affidavit at paragraph "9" swears that; "* as any payments were within my authority, approved by the Executive Board, ratified by the membership, *". Mayes claims that the evidence before the Court now conclusively proves there never was any proper submission by LaBarge, or his successors, as Local 106 Union Business Managers, to the Executive Board, for the Union Executive Board's approval as must be done in compliance with the Local 106 Union Constitution-ByLaws. Mayes has claimed that the one singular act of submission to the Executive Board on October 10, 1983, was on the first hand coerced. But, also, the claimed October 10, 1983 approval was illegally obtained because LaBarge

at that meeting concealed the first $.30 increase in December 1980, the second increase in extra hours of benefits in May 1981 and the across the board salary increase of September 1982. Therefore, accordingly, said claimed approval was a nullity, as the Second Circuit in United States v. Butler , 954 F.2d 114(1992) noted; "An authorization obtained without disclosure of such material information is obviously a nullity. See United States v. Laverge , 805 F.2d 517, 523 (5th Cir.1986." Therefore, Mayes has constructively proven that at all times relevant to this litigation there never has been a single proper authorization of any of his claimed unauthorized increases in the amounts of pension fund per hour rate or increase in hours per week being contributed, nor even any salary increases either. See Amed-Comp. Par. 48,49 & 50, and **Index # 51** , See also Mayes Aff. 5/14/98 Par. 12, 13 & exhibit "4" and **Index # 52** .

In both of LaBarge's Affidavits he attempts to assert a "good faith" claim by stating each of his increases in the amount of pension fund contribution rates were in lieu of wage raises as a benefit to the Union instead of giving pay raises. This attempted "good faith" claim is nullified by the fact of the relevant information LaBarge withheld from the Executive Board, even to the claimed approval of the alleged pay raise of 1984. See laBarge Affidavit 9/30/96 Par, 5, 6, & 7. and **Exhibit # 53**.

Mayes submits that where a question of any "good faith claim" has been challenged upon the record, summary judgement is inappropriate, therefore the Court's MDO of 2/05/99 is clearly erroneous.

POINT IX

FEDERAL REQUIREMENT OF RECORDS TO BE KEPT UNDER ERISA. 29 U.S.C SECTION1027 AND SECTION 308b

Mayes has claimed that the ERISA requirement to prepare and keep certain records that are required under 18 U.S.C. section 1027(1966) as amended, 18 U.S.C. Section 1027(Supp.1976) and where these records contain false information or said records are not kept or in fact are deliberatly destroyed, constitutes a violation actionable in a federal court by a " Trust" participant.

The Second Circuit in United States v. Tolkow , 532 F.2d 853(1976) noted; "18 U.S.C. Section 1027(1966), as amended 18 U.S.C. Section 1027 (Supp. 1976), was enacted to provide enforcement teeth for the WPPDA. H.Rep. No.998, 87th Cong. 2d Sess. (1962), 1962 U.S. Cong. and Admin. News. 1532,1537-39. The WPPDA was designed to protect the interests of participants in employee welfare and pension plans by requiring disclosure and reporting to participants and beneficiaries of financial information which would enable them to effectively check potential mismanagement of the plans. S.Rep. No. 1440, 85th Cong. 2d Sess. (1958). 1958 U.S. Cong. and Admin. News 4137, 4153. In light of this legislative intent and the fact that persons subject to these provisions occupy fiduciary positions and bear concomitant responsibilities, we conclude that the term "knowingly" requires proof of a voluntary, conscious failure to disclose without ground for believing that such non-disclosure is lawful or with reckless disregard for whether or not it is lawful. Not surprisingly, this interpretation parallels the construction of analogous statutes reflecting similar Congressional policies. See, United States v. Ottley , 509 F.2d 667, 672 (2dCir. 1975) (Court instruction of reckless disregard adequate in prosecution for willful failure to maintain records required to be reported by Landrum-Griffen Act), citing with approval Budzanoski , supra."

Mayes claims that the copies of the pension Report Forms

that are required to be kept by Local 106 Union officials under ERISA were prepared with false information in them. That claimed distinct and identifiable information, is the amount of per hour rate of pension benefit contribution above and beyond the amount specifically called for in the Collective Bargaining Agreements (hereafter CBA) that Local 106 was signatory to, where these specific extra amounts were never approved by the Local 106 Union Executive Board nor ratified by the membership. These funds were admittedly taken from the Local 106 Union treasury and therefore without any proper or legal authorization, each act must be considered embezzlement under LMRDA Section 501 (c) and common law fraud, as alleged by Mayes in his verified Amended Complaint. For example see Amed-Comp. Par. 763 - 764, and **Index # 54.**

Mayes has alleged that the failure of Local 106 Union officials to properly compile, prepare and maintain the pension Report Forms is a violation of the legal requirement of ERISA 29 U.S.C. Sections] 1027 & 1059(1975); 29 C.F.R.Section 486.1-486.5(1983), where one or more of the Appellee-Defendants had a statutory and fiduciary obligation to Mayes as a contributor and as a beneficiary of the Engineers Joint Pension Fund and the Central Pension Fund.

The Eleventh Circuit in Combs v. King , 420 F.2d ___ (1985) had cited Sixth Circuit S & Vee Cartage Co. , 704 F.2d 914 (6th Cir. 1983) as noting; "In concluding that the records were required to be retained the Sixth Circuit examined the Welfare & Pension Plans Disclosure Act and a Department pf Labor interpretive bulletin. The court observed that the language of the Welfare & Pension Plan Disclosure Act 29 U.S.C. Section 308b, was virtually identical to 29 U.S.C. Section 1027. *fn3 Thus, the court concluded that "there [was] no indication that the requirement

for the retention of these types of records was changed by the enactment of ERISA." Id.

The Eleventh Circuit also noted in that case that; "An examination of the regulation pertaining to 29 U.S.C. Section 308b supports our conclusion that time cards or similar records of the hours worked by employees are required to be maintained." Mayes has alleged that before any hours of reported and unpaid overtime hours, can be paid on behalf of Local 106 Union officials or office staff, into a pension fund, the required time cards must have been maintained. See Amed-Comp Par. 734 to 739 and **Index # 55**. [cause 32] The Second Circuit in United States v. Tolkow , 532 F.2d 853 (2d Cir .1976) heard an appeal from a judgement entered on a jury verdict convicting appellant of four counts of violating 18 U.S.C. Section 1027 (as amended 18 U.S.C. Section 1027(Supp. 1976), by failing to disclose in annual reports facts required by the Welfare and Pension Plans Disclosure Act. Mayes has alleged the Apellee-Defendants have filed records required under 18 U.S.C. Section 1027, that did contained false information and it was a violation that could be punishable by a fine of not more than $10,000.00 or imprisoned not more than five years or both. Mayes has alleged specifically in cause of action 29, that the alleged conspirators had failed to keep and/or maintain time cards or initiate records of the required basic rate agreements before reporting and paying the documented overtime that was reported on the pension Report Forms. See causes of action 29, 31 and 32. For instance see Amed-Comp Par.767 &768, and **Index # 56**.

Mayes submits a good faith belief that his verified Amended Complaint, with his supporting affidavits and exhibits have properly plead the requisite challenges to the Apellee-Defendants' unlawful acts to sufficiently preclude a summary judgement against him. Therefore the Court's MDO

2/05/99 is believed to be clearly erroneous.

POINT X
RICO CONSPIRACY

The Second Circuit in Hecht v. Commerce Clearing House Inc. , 897 F.2d 21 (2nd 1990) noted; "The RICO civil liability provision confers standing on "any person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. Sec. 1964 (c). Thus in order to have standing, plaintiff must show: (1) a violation of section 1962; (2) injury to business or property; and (3) causation of injury by the violation." See O'Mally v. O'Neill , , 887 F.2d 1557,1561 (11th Cir. 1989) Mayes states a good faith belief that by the records before this Court, he has done so.

The Second Circuit also noted in that case; "This appeal principally concerns the last element: causation. Because a plaintiff must show injury "by the conduct constituting the violation" of RICO, see Sedima, S.P.R.L. v. Imerex Co. , 473 U.S. 479, 496 -- (1985) the injury must be caused by a pattern of racketeering activity violating section 1962 or individual RICO predicate acts. See Bankers Trust Co. v. Rhoades , 859 F.2d 1096,1100 (2d Cir.1988), cert denied, 490 U.S. 1007,1009 ù (2d Cir. 1989)." (emphases added). Mayes has alleged or claimed in each of his causes of action 2, through 13, 22, 25 through 28 and 31, that the named Appellee-Defendants have each individually, as well as collectively, have violated the cited sections of 18 U.S.C. 1962-1964 . As noted in Point I & II, where these acts fall under a claim of continuing violations of law or under fraudulent concealment, the relevant statute of limitations are effectively tolled. Therefore, the causes of action 2 through 13, 22 , 25 through 28, and 31, are not susceptible to dismissal under summary judgement

under the legal premise that the relevant statute of limitations has already run and where in fact they may not have begun to run.

The United States Supreme Court in Reves v. Ernst & Young, 113 S.Ct. 1163, 122 L.Ed. 2d 525, (1993) noted; "Once we understood the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of Section 1962(c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprises affairs, "one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with formal position in the enterprise, but some part in directing the enterprise's affairs is required. The "operation or management" test expresses this requirement in a formulation that is easy to apply." Mayes believes that the record of conduct that is already established in these records may be enough to prove material fact allegations without discovery. However, in the event of any doubt by the Court, the inferences already in these records, should at least preclude a dismissal without any benefit of discovery.

POINT IX
CENTRAL PENSION FUND OFFICIALS HAVE NO POWER TO AUTHORIZE THE STEALING BY LOCAL 106 UNION OFFICIALS FROM THE UNION TREASURY FOR PAYMENT INTO THEIR INDIVIDUAL CENTRAL PENSION FUND ACCOUNTS

Mayes has alleged that neither the Administrator, Counsel, nor the Central Pension Fund Board of Trustees, in Washington, D.

C., have any power or authority to legally grant permission to any Local 106 Union Official, agent or employee, to steal or remove unauthorized funds from the Local 106 Union Treasury, to be transferred into their individual Central Pension Fund accounts. Mayes has set forth in the record before this Court, prima facie records and/or facts that establish a claim that not one single increase in the rate of per hour pension fund contributions for Local 106 Union Official or office staff, that was taken from the Local 106 Union Treasury, was ever properly submitted to the Local 106 Union Executive Board for its approval, nor was any proper ratification by the Union membership properly obtained, as is required by the Constitution-ByLaws of Local 106. See Mayes AFF 1/30/97, Par. 51 and **Exhibit # 57.**

Defendant-Apellee LaBarge's Counsel has falsely claimed that the increases of per hour rate of pension fund contributions to the Central Pension Fund, on behalf of LaBarge and other staff employees, were authorized by Central Pension Fund officials. Mayes is aware that Affidavits of legal counsel are not normally considered in a record to be considered by a Court of Appeals, but Mayes wishes to note an exception and that is first; that Richard P. Walsh, Jr, at all times relevant to this litigation was and still is, a member of Local 106 Union and therefore subject to a subpoena. Furthermore, said litigation has been discussed when others not a defendant, were present, which would destroy any lawyer - client privilege. See Walsh AFF 9/30/96 Par. 25 and **Index #58** .

CONCLUSION

Plaintiff-Appellant Mayes submits that his case in chief is sufficiently documented in the records already before this Court, albeit no discovery was allowed Mayes by order of the District

Court. The clear and straightforward allegations or claims by Mayes, are simply that a policy and practice begun by LaBarge, of embezzling funds from the Local 106 Union treasury by causing pension Report Forms to be compiled and prepared that contained false information in clear violation of ERISA, and also causing a check to be drawn upon the Union Treasury, to be submitted with said Report Form, which was sent through the United States Postal Service in violation of another Federal Statute.

Said policy and practice was continued by each of the Business Manager's successors. Lester E. Jones (deceased), Apellee John J. Kellogg and Apellee Gene Messercola, all of which is set forth in Mayes verified Amended complaint. Therefore, it is well established that these alleged criminal acts constitute a continuing violation, which under the Second Circuit doctrine, tolls the relevant statute of limitations.

Moreover, Mayes has also alleged or claimed that the records before the Court establishes prima facie proof, that not even one single increase in the amount of documented per hour increase in pension fund rate of contributions, that were embezzled from the Local 106 Union treasury were ever submitted and properly approved by the Local 106 Union Executive Board. LaBarge has freely admitted under oath in his Affidavits, that this must be done in compliance with the Local 106 Union Constitution-ByLaws and Mayes likewise claims.. LaBarge also admitted that if such approval was obtained, said approval must also then be ratified by the Union membership at the next subsequent membership meeting. See LaBarge Affidavit 7/28/93 Par. 9 and **Index # 59**.

Furthermore, Mayes' rights as a member of Local 106 Union in good standing as guaranteed by the LMRDA 29 U.S.C. Section 411(A)(1) were violated each and every time a false Report Form was compiled and prepared with false information, that was

also submitted to the Engineers Joint Benefit Fund with a check drawn upon the Local 106 Union treasury, that did contain in it the amounts of money to be paid into the named-defendant ' s personal pension fund account or accounts, as the case may be, where Mayes never had an opportunity to vote upon that expenditure as required by the Union Constitution-ByLaws. Mayes has alleged or claimed, that each such violation of his Section 411(A)(1) rights, beginning with his Amended Complaint at Par.26, and at the last record available to him without discovery, at Par. 767, as is set forth in index #38, is an continuing violation, therefoe precluding summary judgement

Mayes has alleged or claimed that Appellee-Defendant Robert H. Van Dyke, as Adminstrator of the Engineers Joint Pension Fund, did actually aid and/or abett appellees, LaBarge, Kellogg and Messercola in their acts of stealing the amounts of unauthorized money from the Local 106 Union treasury and did help channel said stolen funds into the various individual pension fund account or accounts, as the case may be. This is documented and admitted fully by Van Dyke in his Affidavit in Civil No. 94-CV-26 (Mayes III), dated March 2, 1994, at paragraph 5 & 6. For instance, Mr Van Dyke swore that; "For example, in December, 1993, I.U.O.E. Local 1o6, AFL-CIO submitted $2.50 per hour worked for Messercola to this Pension Fund [Engineers] and $ 3.50 for each hour worked for Messercola to the Central Pension Fund. This Pension Fund performs "conduit services" for the Central Pension Fund relative to receiving the contribution and transmitting it to the Central Pension Fund. [Washington, D.C.]" See Mayes AFF 1/30/97 exhibit # "N", (Van Dyke AFF 3/02/94 Par. 5 & 6), and **Index # 60**.

The maximum amount of per hour pension contribution rate under the Local 106 Union CBA's in effect in 1993 was was only

$1.50 per hour after April, 1991. This fact was well known to Van Dyke, who was the Adminstrator for said Pension Fund, which was comprised of Locals 17, 106, 410, 463, 545 and 832, and he, as Adminstrator, caused the Engineers Joint Pension Fund to prepare the blank Pension Report Forms for these member Locals which did properly list the correct amount of per hour contribution to be paid under the Local's CBA. Local 106 officials purposely and routinely typed over these amounts and typed in the unauthorized higher per hour contribution amounts that are alleged stollen from the Union Treasury. Also, Local 106 Union officials were the only Local overpaying . See exhibits "B" through "I" already in index # 21. Please note, Mayes's Attorney did inadvertantly use letters instead of numbers in his 1/30/97 affidavit.

Van Dyke further admits his knowledge that the Syracuse Fund was a channel for sending the contributions received from Local 106 to the Central Pension Fund in Washington, D.C. Therefore, it is reasonalable that the U.S. Postal Service will be used to transfer these amounts of stolen funds received from Local 106 Union officials to the Central Pension Fund in Washington, D.C., in furtherance of the "LaBarge Group" RICO conspiracy. See Mayes AFF 1/30/97 Par. 78, and **Index # 61.**

Mayes is a third party benificiary of the contract formed by the constitution of the International Union Of Operating Engineers, CIO-AFL and the constitution of Local 106, International Union Of Operating Engineers,CIO-AFL. Mayes submits that for each Summary Judgement dismissal finding by Senior Judge Neal P. McCurn, as against Mayes, it is believed they were each clearly erronous, except for the Court's holding on Section 501(b), which he belevies was an abuse of discretion.

Mayes, respectfully asks this Court to so find and to remand this case back to the distict court for discovery and

preparation for a jury trial on its merits, and for such other and further relief as this Court may deem fair and equitable.

Respectfully Submitted,

/s/George A. Mayes, pro se

Sworn to before me this 14 day
of May, 1999.

/s/ Jane LeCount
NOTARY

APPENDIX E

Plaintiff-Appellant's Petition for Rehearing En Banc Pages 94 - 114

99-7283

****

PETITION FOR REHEARING EN BANC

GEORGE A. MAYES,

Plaintiff - Appellant,

-v.- **No. 99-7283**

LOCAL 106, INTERNATIONAL UNION OF OPERATING ENGINEERS, JANE M. LABARGE, (former) Office Manager, WILLARD J. LABARGE, (Former) Business Manager, RICHARD C. KOSITZKA, (Former) Treasurer, JAMES F. TOMMANEY, (Former) Treasurer, JOHN J. KELLOGG, (Former) President and Treasurer, FRANK LOMIO, Local 106 Training Fund Coordinator, DIANE O'HARE, Office Manager, GORDON M. KILBY, Local 106 Training Fund Trustee, EUGENE HALLOCK, Local 106 Training Fund Trustee, GENE MESSERCOLA, Business Manager, ROBERT H. VAN DYKE, Plan Administrator, Engineers Joint Benefit Funds,

Defendants - Appellees .

****

Plaintiff-Appellant, George A. Mayes, (hereafter Mayes)

appearing pro se, in compliance with Rule 35(b)(1)(A) hereby affirms and states that this request to the Second Circuit Court for a rehearing on said Court's Summary Order dated and filed on November 18, 1999, which **AFFIRMED** the Memorandum, Order and Decision, of Senior Judge, Neal P. McCurn of February 5, 1999.

In compliance with Circuit Court Rule 35(b)(1)(A), Mayes submits that this Petition addresses t he fact that the panel decision conflicts with a decision of the United States Supreme Court in Haines v. Kerner, Boag v. MacDougal.

Plaintiff-Appellant Mayes believes that Circuit Court Rule 35(b)(1)(A) may be more appropriate under the circumstances of the Circuit Court Decision, but Mayes has neither the resources or expertise to determine if; "every other United States Court of Appeals has addressed the issue", which is an automatic dismissal under Summary Judgment for failure to comply with LMRDA Section 501(b). Mayes has only found that several United States Circuit Courts have held differently than the Second Circuit.

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Mayes believes the Jurisdiction of the District Court in this matter is under the statutory authority of U.S.C. Section 1331.

Mayes believes the jurisdiction of the Second Circuit Court in htis matter is under the statutory authority of 28 U.S.C. Section 1291.

STATEMENT OF ISSUES

1. Whether the SUMMARY ORDER of 11/18/99 fairly "Agreed" with the District Court in it's review under *Anderson and Haines*, those decisions would apply to a pro se Plaintiff-Appellant.

2. Whether the District Court dismissed Mayes' allegations pertaining to 150 unequal job opportunities, as being without merit or were they dismissed because the Court found they began in 1980. Mayes has alleged these 150 job opportunities were an example of continuing and on-going violations.

3. Whether Mayes had ever alleged or claimed material facts that were continuing and on going violations prior to his Appeal of Senior Judge Neal P. McCurn's MDO of 2/05/99.

4. Whether the strictest application of compliance with the LMRDA 29 U.S.C. Section 501(b) compels these Courts to dismiss under Summary Judgment, a pro se Plaintiff's verified Amended Complaint, with absolutely no recourse, after six years of litigation, with no discovery being allowed by the District Court.

STATEMENT OF THE CASE

Plaintiff-Appellant Mayes commenced this action pro se June 3, 1993. In this action, Mayes' core allegations were the stealing of funds from the Local 106 Union Treasury by the principals of the "LaBarge Group" RICO conspirators, co-conspirators and their aiders and/or abettors, beginning in 1981 and was on going and continuing at the time of the commencement of this action in 1993. Said conspirators were joined at later times by other conspirators and other aiders and/or abettors, as was necessary to continue the stealing of said funds from Local 106 Union Treasury, and have these stolen funds transferred from said Union Treasury, by a check drawn upon said Treasury. These checks were sent through the United States Postal Service, to the Engineer's Joint Benefit Funds, with a "Report Form", as payment of pension and other benefits, provided for under the relevant Collective Bargaining Contracts, under which the Engineers Joint Pension Fund had been established.

The alleged criminal acts of Defendants began by Defendant Willard J. LaBarge's unilateral decision as Business Manager of Local 106 Union, to double the Pension contribution per hour rate to the Central Pension Fund in Washington, D.C. in direct violation of the Local 106 Union Constitution and By-Laws. Said Constitution and By-Laws require such expenditures from the Union Treasury to be submitted to the Local 106 Executive Board for it's approval and thereafter, at the **next subsequent** membership meeting, said expenditure **must** be ratified by the Union

Membership as required by said Union Constitution and By-Laws. These claims were based under a number of federal statutes including the Racketeering Influenced and Corrupt Organization Act (RICO) Section 1961-1965 and the Employees Retirement Income Act (ERISA) 29 U.S.C. 1001 et seq. among others. (Record - Plaintiff's Amended Complaint.) The Defendants answered in the form of a Motion to Dismiss, or in the alternative for Summary Judgment, as to the original Complaint, August 2, 1993. Mayes filed an Amended Complaint and RICO Statement on July 26, 1996. Defendants filed a motion to dismiss or in the alternative, a motion for summary judgment on or about October 4, 1996. With the help of several Union member supporters, Mayes was able to obtain the legal services of Attorney Peter Henner, in October, 1996, who acted on Mayes' behalf to oppose the motions made by defendants, submitting his opposing papers in February 1997.

On or about March 10, 1998, the District Court served notice to the parties that the Court intended to treat Defendants' motion as a motion for Summary Judgment and instructed the parties to make further submissions in support of their respective positions on the pending motion. Additional submissions were then made by both parties.

By the Memorandum-Decision & Order of Senior Judge Neal. P. McCurn dated February 5, 1999, the District Court granted the Defendants' Motion for Summary Judgment. Within the time frame allotted, Mayes appealed the MDO by Notice of Appeal dated March 8, 1999.

STATEMENT OF FACTS

Plaintiff-Appellant Mayes has been a member in good standing of Local 106, International Union of Operating Engineers for more than forty-five years. Mayes has been involved in an

almost 20 year effort to obtain a measure of justice from the alleged wrong doings of certain officers of Local 106 Union. Mayes filed as a pro se individual, first by the original Complaint in June 1993 and again as an individual, an Amended Complaint on July 26, 1996. This action was brought against the Union, several of its former Business Managers and other officers, two office workers, as well as the Pension Plan Administrator of the Engineers Joint Pension Fund and the Local 106 Union Coordinator of the Local 106 Training Fund. The gravman of this action is primarily for alleged violations of Racketeering, Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. Sections 1961-1968, as well as many of these same acts or violations were violations of the Employee Retirement Income Security Act, (hereafter ERISA) 29, U.S.C. Sections 1101, 1104 and 1132, the Labor Management Reporting and Disclosure Act (hereafter LMRDA) 29 U.S.C. Sections 411, 412, 529; The Hobbs Act, 18 U.S.C. Section 1951, and the Fair Labor Standards Act (hereafter FLSA) 29 U.S.C. Sections 201-219; Section 301 of the Labor Management Relations Act of 1974 (hereafter LMRA) 29 U.S.C. Sections 185-186.

SUMMARY OF THE ARGUMENT

It is respectfully submitted that the District Court failed to properly review the evidence submitted by Mayes, as said evidence would bar the granting of Summary Judgment against pro se Mayes, dismissing his entire case, and as such, not in conformity with the United States Supreme Court's holdings in *Haines v. Kerner, Steele v. Louisville & Nashville Railroad Co.* and *Anderson.*

a) Most particularly, the Union's pension Report Forms, which document and establish a prima facie documentation of the many acts of stealing, by the Defendants, of funds from the Local 106 Union Treasury and by this normal payroll procedure, have

stolen funds transferred into said Defendants' individual Pension account or accounts, as the case may be.

b) Additionally, by failing to find that none of the hundreds of thousands of dollars that were documented by Mayes, as being taken from the Local 106 Union Treasury, **were ever** authorized by the Local 106 Union Executive Board or ratified by the Union Membership body, from 1981 to 1993. Defendant Willard J. LaBarge's Affidavit of 1993 and 1996, both freely admit on the record that all such expenditures taken from the Union Treasury **must** be submitted to the Local 106 Union Executive Board for approval and then at the next subsequent membership meeting, be ratified by the membership body. Mayes has likewise claimed the same facts and also submitted copies of said Consitution and By-Laws to document unquestionably the approval **must** be had for expenditures to be taken from the Union Treasury.

3) Additionally, the District Court failed to find that the one and only record submitted by the Defendants as proof that said required submission to the Local 106 Union Executive Board had been done as required by said Constitution and By-Laws, was a copy of the Executive Board meeting of October 10, 1983. This record **only** made reference that Defendant Willard J. LaBarge had informed the Executive Board members that he was increasing the per hour rate of pension contributions on behalf of the office staff, by twenty-five (25) cents per hour. LaBarge's brother, William Maxwell, made a motion to approve and it was seconded and passed. This is the **only** record submitted by Defendants in over six years of this litigation. Mayes claims this alleged approval is a nullity by the fact that LaBarge withheld the fact that he had unilaterally already increased his own and the office staff's hourly rate of pension contributions in 1981, without required approval and he had also added eight hours per week of overtime hourly

contributions to a different Pension Fund in May 1981, also without approval. Where an approval is obtained without all the facts being presented, said approval is a nullity. Therefore, by these records that were under Summary Judgment review by the District Court, which at a minimum creates material fact questions also precluding Summary Judgment, dismissing a pro se Mayes entire case.

4) The District Court's failure to find that where records that were required under the laws of ERISA, which contained false information that was prepared and/or compiled by the defendants, were routinely sent through the United States Postal Service, beginning in 1981 and was continuing in June 1993, when this litigations commenced, that said mailings did constitute Mail Fraud under 29 U.S.C. Section 1341.

Therefore, the Summary Order of the Second Circuit of Noovember 18, 1999, which states; "We affirm for substantially the reasons stated by the district courrt See Mayes v. Local 106, No. 93-CV-716, 1999 WL 60135, at *1-10.", compels Plaintiff-Appellant Mayes to respectfully request a Rehearing En Banc.

STATEMENT OF STANDARD OF REVIEW

The Court of Appeals reviews de novo the District Court's grant of a Summary Judgment to determine whether there is an absence of any genuine issues of material fact and whether moving party is entitled to judgment as a matter of law.

ARGUMENT

POINT I

THE CIRCUIT COURT'S SUMMARY ORDER UPHOLDING THE DISTRICT COURT'S DECISION AS TO PAGES *1-10 OF 1999 WL 60135 FAILS TO COMPORT WITH *HAINES*

Mayes states that said 1999 WL is the full test of Senior Judge Neal P. McCurn's MD-O of February 5, 1999. The said

MD-O is hereto attached. Mayes finds at page 5; "Plaintiff explains that members of Local 106 participate in two pension funds: the engineers Joint Pension Fund ("Engineers Fund") and the Central Pension Fund ("Central Fund"). Contractors who hire Local 106 members contribute to these funds based upon rates determined by collective bargaining agreements. Local 106 likewise contributes to these funds, but its payment are made on behalf of its paid officers and office staff. Local 106 does not contribute directly, however. It channels payments through the Engineers Joint Benefit Funds ("Joint Fund"), which administers the Engineers Fund and acts as a conduit to the Central Fund."

At this point there appears a foot note designation as "4". This footnote at the bottom of page 5 is; "Although **the matter is not entirely clear to the court**, apparently when Local 106 made contributions to the Joint Fund, the contributions ultimately were earmarked for either the Engineers Fund, which the Joint Fund administered, or for the Central Fund, which it did not administer. By referring to the Joint Fund as a conduit to the Central Fund, Plaintiff alludes to the Joint Fund's practice of receiving Local 106's contributions earmarked for the Central Fund and transmitting those contributions to that fund."

Page 5 of the MDO continues; "Along with its contributions, Local 106 submits reports to the Joint Fund. Plaintiff who has reviewed these reports, charges Local 106 with making excessive contributions to the Joint Fund from 1981 to 1993. By his estimate, the total overpayments amount to more than $225,000. See **Appendix, Exhibit #1, copy of MDO - 2/05/99 and SUMMARY ORDER - 11/18/99**.

Mayes submits that the above finding by the District Court should not be affirmed by this Circuit Court because; Plaintiff **not only** has reviewed copies of the "reports" but possess Micro-Film

copies and paper copies of these Union "Report Forms" from 1980 to 1993, and has submitted numerous copies with his Affidavit of January 30, 1997. Additionally, Mayes has **specifically** identified the information as is documented on these "Report Forms", that are already in his possession, by the hundreds of paragraphs of his Amended Complaint, which is composed of over 600 pages. Mayes has entered into evidence before the District Court, copies of many of Local 106 Union's pension "Report Forms", thereby providing the District Court with prima facie proof of the amount of **unauthorized** pension contributions, both **per hour** and **extra hours** that were stolen from the Union Treasury. The District Court failed to review these material facts under the legal premise of *Haines & Anderson...* See **Appendix Exhibit #2, pages 4-7 and exhibits "B" and "I", Mayes Affidavit 1/30/97, (inappropriately identified by letters).**

The MDO next at page 6 states; "Defendants' excessive contribution scheme allegedly had two angles. First, in making their contributions to the Joint Fund, which, **if the court understands correctly,** ultimately were intended for the Engineers Fund, defendants **customarily** over reported the hours Local 106's staff members and officers **worked** by six to eight hours per week. Second, when defendants sent the Joint Fund contributions intended to be passed through to the Central Fund, they based these payments on an improper, higher hourly rate.**" The District Court's findings are procedurally somewhat true, but totally fails to relate that the payment of over reported hours was unauthorized, **therefore stolen,** and do not reflect the truth as alleged by Mayes. The over reporting of hours so that the Defendants would **pay** into their Pension Fund accounts or accounts as the case may be, was by money being stolen from the Union Treasury, because there was

never any authorization for any such payment from the Union Treasury. Mayes, Defendant Willard J. LaBarge and Defendants' Counsel, have **all** certified to the District Court that any such payment from the Local 106 Union Treasury **must** be submitted to the Union Executive Board for its approval and then be ratified at the **next subsequent** membership meeting. Mayes' verified Amended Complaint sets forth the many times, with appropriately dates and money amounts that Defendants transferred specific amounts of money from the Union Treasury into their personal Pension Fund accounts. See **Appendix Exhibit #3, copies the relevant pages of Defendant LaBarge's Affidavits of 9/28/93 & 9/30/96, stating the above.**

Mayes wishes to judicially notice to the Second Circuit Court the fact that Mayes has recorded and the District Court **so found** that Mayes did charge the Defendants with these violations as being **ongoing and continuing** from 1981 to 1993, as was stated on MDO page 5.

The MDO of 2/05/99 at page 10 states; "**while number twenty-two contends improper payments were authorized to the Joint Fund. Five more causes of action, numbered twenty-eight and thirty-one allege various defendants filed false reports with the Joint Fund and allowed overpayments into their pension fund. Cause of action twenty-nine contends defendants did not keep proper payroll records, establish a basic wage rate for union employees, or have a procedure in place to check time cards for claims of overtime, and cause number thirty asserts as of the date of the Amended Complaint that was filed, defendants still were receiving unauthorized pension contributions. Finally, causes of action number thirty-two and thirty-three allege improprieties in the compiling and filing of overtime reports.". The first line of the District Court's statement, quoted above that cause of action,

numbered twenty-two, does not comport with the proper review under *Anderson* and *Haines*, as to the facts alleged by Mayes pertain to the obvious acceptance by the Fund of the unauthorized **overpayments** submitted by Local 106 officials with the "Report Forms" that were originally printed and furnished by the "Joint Fund" which had printed on the bottom portion of said Report Form, **the correct rate of pension contributions allowable by the current Collective Bargaining Agreement**. Therefore, the acceptance and processing of these overpayments by the officers, agents and/or employees of the Joint Fund, where Mayes' Micro-film pension records document that Local 106 Union Officials **were the only Union Officials** of six Local Unions comprising the **Engineers Joint Pension Fund that were doing it**, by typing **over** the correct amount allowed by the CBA's, and **typing** the unauthorized rate of pension contribution for their personal benefit. Mayes twenty-second cause of action is ninety (90) pages with over one (100) paragraphs, covering the alleged processing of the Local 106 Union Report Forms containing the various unauthorized amounts of money alleged stolen from the Local 106 Union Treasury, from 1981 to 1986. See **Appendix, Exhibit #4, copy of Mayes' first three and last four pages of his twenty-second cause of action of his Amended Complaint.**

Also found by the District Court, as noted above, causes numbered twenty-five to twenty-eight and thirty-one, that Mayes alleged "various defendants filed false reports with the Joint Fund and **allowed** overpayments into their pension fund.**". Mayes **did** allege that various Defendants filed false "Report Forms" but their intent was not to **"allow overpayments"** into their pension funds, but to **deliberately** transfer the unauthorized amount of money from the Union Treasury into their pension fund accounts by that specific

means.

The District Court at page 9 also found; "Turning to Plaintiff's civil RICO claims, it is evident he lacks standing to argue most of them because the injuries he alleges, rather than being unique to him, would be the type suffered by Local 106 as a whole." Mayes respectfully asks this court to review his Appeal **POINT VI** as to the substantial claims and/or allegations set forth that fairly set forth material facts that illustrate to the District Court support for his claim that there was an injury to Mayes' business and property that was unique to him, with appropriate references to case law. The District Court's MDO finding is clearly erroneous under the premise of *Anderson* where a plaintiff's verified Complaint must be construed as true. **See Appendix Exhibit #5, copy of Point VI, pages 24-27 of Mayes' Appeal.**

Also at page 10 the District Court addressed Mayes' contentions that in cause twenty-nine the defendants did not keep proper payroll records, establish a basic wage rate for union [office staff] employees, or have a procedure in place to check time cards for claims of overtime. The District Court neglected to state or find that as a matter of law, the defendants were required to do so, or if, in fact they had done so, thereby documenting upon the record a material fact question precluding Summary Judgment under the premise of *Anderson* and *Haines*.

POINT II

DISTRICT COURT DID NOT CONCLUDE MAYES' 150 JOBS HAD NO MERIT

This Court's SUMMARY ORDER at page 2, determines that; "As to appellant's claims under the Taft-Hartley Act 29 U.S.C. Sec. 157, the district court dismissed them without discussion, **concluding they had no merit.** See Mayes, 1999 WL 60135, at *10. **We agree.**". Therefore, it is documented the

Circuit Court affirms the District Court who state at page 13; "Plaintiff's claim he lost the opportunity tow ork on 150 job assignments presents a different problem. **Although this is the type of compensable injury contemplated by civil RICO,** this claim ultimately fails. As **defendants counter**, plaintiff does not explain how his alleged loss of job opportunities amounted to the required predicate acts to support a civil RICO claim." A fair reading of the MDO 2/05/99 **does not** disclosed that Mayes' claim about the 150 jobs was dismissed without discussion, concluding that they had not merit, but does document that the District Court considered the facts under the question of statute of limitations, as these job opportunities began back in 1980. This also discloses the District Court's knowledge that there was an ongoing and continuing claim set forth by Mayes. Mayes asks this Court consider a new review these facts under *Haines* first, as Mayes being pro se may well have inartfully constructed his verified Amended Complaint, and under *Anderson*, where the **defendants** truthfulness is accepted by the court over Mayes' claims. See Senior Judge's MDO 2/05/99 as Appendix Exhibit #1, and the SUMMARY ORDER of 11/18/99 as Appendix Exhibit #1.

As to the SUMMARY ORDER questioning the District Court's jurisdiction, (page 2) Mayes states under oath, **none** of the 150 job opportunities were ever litigated in Civil No. 86-CV-41 (Mayes I) nor do any of the 150 jobs rise to question under the Duty of Fair representation of the LMRA, therefore the District Court does have jurisdiction.

POINT III

THE SUMMARY ORDER REFLECTING MAYES' CLAIM OF CONTINUING AND ONGOING VIOLATIONS IS INCORRECT

Mayes asks reconsideration of this Circuit Court's holding

that rejected appellant's contention on appeal that some of his time-barred claims can be resurrected based on a "continuing violation" theory. The Court held; "Appellant neither pled nor alleged prior to this appeal that these claims were "ongoing violations". This is totally in error as Mayes first set forth in his Affidavit of 9/20/93, paragraph 56, which stated; "In equal response to all 39 paragraphs of attorney Walsh's affidavit as he is making a stipulation on behalf of all the Defendants, Plaintiff alleges that the admissions of the Defendants' in Mr. LaBarge's affidavit and the Defendants' exhibits all establish the question of fact supporting Plaintiff's claim that the applicable statute of limitations may not have even begun.". See **Appendix, Exhibit #6, copy of page 22, paragraph 55, of Mayes' Affidavit 9/30/93**.

Mayes Amended Complaint is replete with allegations of ongoing and continuing violations, as follows; page 475, paragraph 653, which in part states; "Plaintiff alleges that between June 3, 1985 and January of 1991, that the unauthorized overpayments did continue." Page 517 & 518, paragraph 683, which in part states; "Plaintiff alleges that all the alleged predicate acts in violation of RICO 18 U.S.C., 1962(a), (b), (c), and (d) as are set forth on paragraphs 660 through 682 above, are continuing predicate acts of the LaBarge group conspiracy that is alleged to have begun in 1979. *** for each of the officers and staff employees of Local 106 Union, thereby effectively tolling the Federal Statute of Limitations in this litigation.". See **Appendix, Exhibit #7, copy of Amended Complaint Part III, pages 517 & 518.**

Mayes also very specifically alleged at Page 594, paragraph 742, that; "Plaintiff sets forth in this Cause of Action a number of records for the **specific** purpose of establishing the relevant fact that the "LaBarge Group" conspiracy that began in 1979 has continued to June 3, 1992, the date of the filing Civil No.

93-CV-716 - (Mayes II). The reference to records and/or events subsequent to June 3, 1993, is not intended to extend the case time of Civil No. 93-CV-716, but is submitted to support plaintiff's contention that said cosnpiracy active and **ongoing** as of June 3, 1996. **Therefore a ongoing and active conspiracy from about 1979 to June 3, 1993 does settle the question of any federal statutes of limitations as they may apply to this litigation."** See **Appendix, Exhibit #8, copy of said page 594 & paragraph 742.**

Also, page 596, paragraph 747 (corrected type from 737); page 597, paragraph 748; page 598, paragraph 748; page 598, paragraph 749; page 600, paragraph 752; page 605, paragraph 757; each of said paragraphs refer to an allegation by Mayes of Defendants' "ongoing conspiracy" acts. See **Appendix, Exhibit #9, copies of said pages 596, 597, 598, 600, 605 and referenced paragraphs.**

Mayes submits the complete test of his Amended Complaint, paragraph 759, (page 606) states; "Plaintiff alleges that this Report Form for pay period of 7/28/93 to 8/24/93, being a pay period occurring within sixty (60) days after Civil No. 93-CV-716 was filed, **does document the cessation** of the conspirators, co-conspirators, aiders and/or abettors, in the **practice of paying extra hours as "over time hours"** into the Engineers Joint Pension Fund and the Central Pension Fund. Part of this aforesaid practice began with the Report Form for the pay period of May 13 to May 26, 1981, and paid into the Engineers Joint Pension Fund.

Plaintiff alleges that the **practice** of paying the alleged "overtime hours" may have begun before April 1987, however the first Report Form Plaintiff has that documents this practice is for the pay period of 6/24/87 to 7/28/87 for the following employees; lester E. Jones, Diana M. O'Hare, John J. Kellogg, James F.

Tommaney; Lori Gibbons; Gene Messercola, where a total of 160 alleged "over time hours" were paid into the Central Pension Fund at the rate of one dollar eighty cents ($1.80) per hour. Each such act of reporting and paying these alleged overtime hours from the Local 106 Union Treasury **without authorization** of the Local 106 Executive Board and the Local 106 Union Members, **each act** constitutes an act in furtherance of the conspiracy to control Local 106 Union as a RICO "enterprise". See **Appendix, Exhibit #10, copy of page 606, paragraph 759 of the verified Amended Complaint.**

Mayes also submits the following, as other proof of his setting forth allegations as to the tolling the federal statutes of limitations; page 630, paragraph 774; page 632, paragraph 775 & 776; page 633, paragraph 777 & 778; pages 634 & 635, paragraph 779. See **Appendix, Exhibit #11, copies Amended Complaint, of pages 630, 631, 632, 633, 643, and 635.**

Mayes' verified Amended Complaint also contains allegations that allude to the tolling t he applicable statutes of limitations at pages 25, 26, 27 & 28, as paragraphs 48 to 50. See **Appendix, Exhibit #12, Amended Complaint pages 25 through 28.**

POINT IV
THE QUESTION OF LMRDA SECTION 501(B) BEING ABSOLUTE AND WITHOUT RECOURSE

The SUMMARY ORDER at page 3 rejected Mayes' claim that his appeal to the Union Officials would be futile. Mayes' claim was first set forth in his original Complaint and specifically with his verified Amended Complaint at page 22, paragraph 43, where he stated: "Plaintiff asserts a claim that to pursue internal remedies under LMRDA, Sec. 501(c) would be futile as the appeal would be to some of the same officials who are involved in these wrongful

acts."

Mayes filed his original Verified Complaint on June 3, 1993. It was his sincere belief that under the United States Supreme Court's holding in Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 65 S.Ct. 226, that seeking the Union to sue or petition the Court to sue, was not always necessary. It still was Mayes' belief when he filed his Appeal 99-7283 as was stated in "POINT IV", page 12 through 15. Although Mayes has inadvertently listed the alleged violations under Section 501(c), which the acts of alleged stealing are, the right to sue comes under Section 501(b). The District Court did so determine, but then promptly ruled that said Section 501(b) was dispositive of Mayes' allegations, without more.

The Second Circuit in Dunlop-McCullen v. Local IS, 149 F.3d 85 (2d Cir. 1998) that; "This Court has found that the "good cause" required for leave to sue under Section 501(b) serves two policies: "[1] supervision of union officials in the exercise of their obligations and [2] protection, through screening mechanism, of the internal operation of a union against unjustified interference or harassment." Cf. Dinko v. Wall, 532 F.2d 68, 75 (2d Cir. 1976). Mayes believes that the records and/or documents that he has already been able to submit to the District Court, albeit without any discovery, has certainly provided to the court with ample proof that he can, if no already has, meet the "good cause" requirement of 501(b). See **Appendix, Exhibit #13, copy of pages 12-15 of Mayes' Appeal.**

Mayes now asks this Court to also consider the holding in United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 which noted; "The palin meaning of the legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the

intentions of its drafters.". Mayes believes that the intent of Section 501(b), as stated under the premise [1] as noted by this Court in Dunlop-McCullen as being - "supervision of union officials in the exercise of their obligations." Therefore Mayes asks due consideration of the facts and evidence in the records of six years of litigation, that contain prima facie proof of certain Defendants having stolen funds from the Local 106 Union Treasury, where the District Court's Summary Judgment dismissal of all thirty-three Causes of Action, could mean the documented wrong doing of certain Defendants would go completely unaccounted for. Referring now to Supreme Court's holidng in *Ron Pair*, as applied to Mayes' case, it would appear said Dismissal and this Court's Affirming of said dismissal, that would not meet the intent of the legislation drafters.

This Court in Greene v. United States, 79 F.3d 1348, 1353 noted; "The statutory language remains of paramount importance . . . because when we find terms of a statute unambiguous, Judaical inquiry is complete, except in rare and exceptional circumstances." (Quoting Rubin v. United States, 449 U.S. 424, 430 (1981)". Mayes requests this Court to consider these holdings as they should apply to this litigation and as is supported by the records and information before the Courts, under Summary Judgment.

CONCLUSION

Mayes respectfully requests of this Court for a Rehearing En Banc, in the interest of justice. As a pro se, Mayes has made procedural mistakes and assumptions of beliefs, perhaps not fully supported in law, but the facts and records that he has assembled truly support his six years of litigation. To allow Mayes' case to be dismissed, without recourse, would be a great injustice because: Defendants have admitted their acts of taking funds from the Union Treasury. Their only defense is an **unproven** claim that they were

all authorized. The District Court did not find these were authorized.

The District Court did not find Mayes Amended Complaint failed to meet Rule 9(b) for the required specificity of a RICO claim. Neither did the Court find that Defendants' acts were not in fact deliberate concealment, as Mayes had documented and alleged, thereby effectively tolling the relative statutes of limitations.

The SUMMARY ORDER of 11/18/99 did incorrectly state that Mayes had neither pled nor alleged prior to this appeal that these claims were "ongoing violations." Mayes has attached hereto a "Appendix", which provides documentation to the contrary, beginning in 1993 through 1996. A Motion to allow Mayes to file said appendix is being filed simultaneous with this request for Rehearing En Banc.

Mayes requests relief of this Court for an opportunity to proceed with this case by asking this Court to change its findings, so at a minimum a Dismissal, without prejudice, with leave to petition the District Court for permission to sue, or if necessary, approach the Union as a first step. The records and/or documents necessary for proof at trial do exist and will continue to exist, as most are required to be kept for seven to ten years under ERISA. Those records outside that category already are in Court's or Mayes' possession.

In sum, Mayes requests this Court's consideration as to *Haines v. Kerner* on premise that there has been no discovery allowed by the District Court in six years of litigation.

Dated: December 1, 1999

Respectfully Submitted

/s/
George A. Mayes
11 Gold Street
Warrensburg, New York 12885
518-623-9389

Sworn to before me this 1st of
December, 1999.

/s/ Jane LeCount
NOTARY

Counsel Of Record for Respondents:
RICHARD P. WALSH, JR. ESQ.
LOMBARDI, REINHARD, WALSH & HARRISON, P.C.
III WINNERS CIRCLE
ALBANY, NEW YORK 12205
(518) 438-2000

GEORGE A. MAYES, *pro se*
11 GOLD STREET
WARRENSBURG, N.Y. 12885
(518) 623-9389